Supreme Court of the United States

OCTOBER TERM, 1969

No. 190

JAMES TURNER,

Petitioner,

—VS.—

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

DOCKET ENTRIES

Date	Proceedings
7-20-67	Indictment for unlawfully receiving, concealing and facilitating the transportation and concealment of a narcotic drug knowing said drug to have been fraudulently imported into the United States; purchasing, possessing, dispensing and distributing narcotic drug not in or from original stamped package; filed 7-19-67.
7-20-67	Notice of Allocation filed. (Newark)
7-24-67	Ordered defendant remanded to jail. (Coolahan) (7-21-67)
8-22-67	Ordered defendant remanded to jail. (Coolahan) (8-18-67)
8-23-67	Order appointing counsel, filed 8-22-67. (Coolahan)
9- 5-67	Ordered defendant remanded to jail. (Wortendyke) (9-1-67)
9- 6-67	Order for substitution of appointed counsel filed 9-5-67. (Wortendyke)
9-19-67	Plea—Not Guilty. (Wortendyke) (9-15-67)
9-19-67	Ordered defendant remanded to jail. (Wortendyke) (9-15-67)
9-19-67	Defendant's Notice of Motion to suppress evidence filed 9-16-67. (no brief)
9-27-67	Hearing on defendant's motion to suppress evidence. Ordered motion denied. (Wortendyke) (9-26-67)
9-27-67	Trial moved before Hon. Reynier J. Wortendyke, Jr., Judge and Jury. (9-26-67)
9-28-67	Trial continued. (9-27-67) Hearing on defendant's motion for judgment of acquittal. Ordered motion denied. Verdict: Guilty. Ordered defendant remanded to jail.

Date	Proceedings
9-28-67	Question of Jurors filed 9-27-67.
11- 8-67	Information as to prior narcotic conviction filed 11-6-67.
11-15-67	Sentence: Ten years on count 1; five years on count 2 to run concurrently with sentence imposed on count 1; ten years on count 3 to run consecutively to sentence imposed on counts 1 and 2; five years on count 4 to run concurrently with sentence imposed on count 3 but consecutively to sentence imposed on counts 1 and 2. (Wortendyke) (11-14-67)
11-20-67	Judgment and Commitment filed 11-17-67. (Wortendyke)
11-28-67	Notice of Appeal filed 11-27-67.
11-28-67	Copies of Notice of Appeal sent to U.S. Attorney and Clerk, U.S.C.A.
12- 6-67	Copy of Judgment and Commitment with Marshal's return thereon filed.
12-19-67	Copy of Voucher for Compensation and Expenses of Appointed Counsel filed 11-28-67. (Wortendyke)
12-26-67	Record on Appeal sent to U.S.C.A.
2- 8-68	Electronic record of plea filed 2-6-68. (See Env. N-170)
3-15-68	Certified copy of Order of U.S.C.A. granting appellant leave to appeal without prepayment of fees or costs; for docketing appeal and filing record out of time filed 3-14-68.
4- 9-68	Certified copy of Order of U.S.C.A. allowing copy of transcript of all proceedings to be furnished to defendant at expense of U.S.; etc., filed.
6- 6-68	Transcript of hearings held on September 26, 1967, filed.
6- 6-68	Supplemental Record on Appeal forwarded to Clerk, U.S.C.A.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 17,181

DATE	FILINGS—PROCEEDINGS
1968	
Mar. 13	[Transferred from Misc. Record No. 887]. Order (*Hastie*, Chief Judge and Freedman and Van Dusen, Circuit Judges) granting appellant leave to prosecute his appeal without prepayment of fees and costs or without giving security therefor, to file typewritten briefs and appendix and docketing the appeal and filing the record out of time as of the date of this order, filed. Certified copy of above order to Clerk of District Court. Copy of Notice of Appeal, rec'd. November 29, 1967, filed. Record, rec'd. December 27, 1967, filed. (Exhibits G-1 and G-2 contained narcotics—returned to Clerk of District Court on January 9, 1968). CJA Form 11 ORDER (*Hastie*, Chief Judge and Freedman and Van Dusen, Circuit Judges) appointing Josiah E. Dubois, Jr., Esq. 511 Cooper St., Camden, N.J. as counsel for appellant in this case, filed.
Mar. 19	Appearance of Josiah E. DuBois, Jr.; DuBois, Maiale & DuBois, for appellant, filed.
Mar. 20	Motion by appellant for free transcript of proceedings including a transcript of hearing on motion to suppress evidence and transcript of trial in District Court and to extend time to file brief and appendix to 60 days from receipt of transcript filed. (4 copies). Proof of mailing in letter of 3/19/68.

DATE	FILINGS—PROCEEDINGS
1968	
Apr. 1	Submitted on Appellant's motion for free transcript, etc., and to extend time to file brief and appendix. Coram: Kalodner, Ganey and Van Dusen, Circuit Judges.
Apr. 5	Order (*Kalodner*, Ganey and Van Dusen, Circuit Judges) directing appellant be provided with copy of the transcript of all proceedings in the court below, the expense to be borne by the U.S. out of funds appropriated for that purpose; and extending the time for filing appellant's brief and appendix to 60 days after the certified transcript is filed as a supplemental record with the Clerk of this Court, filed.
Apr. 5	Certified copy of above order to Clerk of the District Court.
Apr. 5	Certified copies of above order and order granting forma pauperis to Official Court Reporter, Mr. Lee Beal.
Apr. 20	Letter, dated April 29, 1968, from counsel for appellant advising receipt of transcript from Official Court Reporter on April 26, 1968.
June 7	First supplemental record (No. 12-transcript), filed.
June 11	Statement of contents of appendix to brief for appellant, filed. (Proof of mailing attached.) * * * of 6-11-68
June 25	Brief and appendix for appellant, filed. (4 typed copies). Proof of mailing in letter of June 24, 1968.
July 25	Brief and appendix for appellee, filed.
July 27	Proof of mailing of above on July 25, 1968, filed.

DATE	FILINGS—PROCEEDINGS
1968	
Aug. 7	Reply brief for appellant, filed. (4 typed copies). Proof of mailing in letter of August 6, 1968.
Aug. 30	Second supplemental record (No. 13-transcript), filed.
Sept. 24	Argued. Coram: Biggs, Freedman and Van Dusen, Circuit Judges.
Dec. 10	Opinion of the Court (Biggs, Freedman and *Van Dusen*, Circuit Judges), filed.
Dec. 10	Judgment affirming the judgment of the District Court, filed November 17, 1967, filed.
Dec. 27	Motion by appellant for stay of issuance of the mandate pending the filing of a petition for writ of certiorari, filed. (4 copies).

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17,181

UNITED STATES OF AMERICA

vs.

JAMES TURNER, APPELLANT

SUPPLEMENTAL DOCKET ENTRIES

1968		
Dec. 30	Certified copy of appendices and proceedings in this Court to Josiah E. DuBois, Jr., Esquire.
1969		
Jan. 2	Order (Biggs, Freedman and Van Dusen, Circuit Judges) staying issuance of the mandate to January 30, 1969, filed.
Jan. 2	Certified copy of supplemental proceedings in this Court to Josiah E. DuBois, Jr., Esquire.

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745,466

IN UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 316-67

Title 21 U.S.C., Section 174
Title 26 U.S.C., Sections 4704(a), 4701, 4703 and 7237(a)

UNITED STATES OF AMERICA

vs.

JAMES TURNER

INDICTMENT—Filed July 19, 1967

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges:

COUNT I

That on or about June 1, 1967, at Weehawken, in the District of New Jersey,

JAMES TURNER

fraudulently, knowingly and unlawfully received, concealed and facilitated the transportation and concealment of a narcotic drug, that is, Heroin Hydrochloride, after the same had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law, he, the said James Turner, then and there well knew that the said narcotic drug had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law.

In violation of Section 174, U.S.C., Title 21.

COUNT II

That on or about June 1, 1967, at Weehawken, in the District of New Jersey,

JAMES TURNER

did knowingly, willfully and unlawfully purchase, possess, dispense and distribute a narcotic drug, Heroin Hydro-

chloride, in that the said defendant, James Turner, did purchase, possess, dispense and distribute said drug which was not in or from the original stamped package.

In violation of Sections 4704(a), 4701, 4703, 7237 (a), U.S.C. Title 26.

COUNT III

That on or about June 1, 1967, at Weehawken, in the District of New Jersey,

JAMES TURNER

fraudulently, knowingly and unlawfully received, concealed and facilitated the transportation and concealment of a narcotic drug, that is, Cocaine Hydrochloride, after the same had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law, he, the said James Turner, then and there well knew that the said narcotic drug had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law.

In violation of Section 174, U.S.C. Title 21.

COUNT IV

That on or about June 1, 1967, at Weehawken, in the District of New Jersey,

JAMES TURNER

did knowingly, wilfully and unlawfully purchase, possess, dispense and distribute a narcotic drug, Cocaine Hydrochloride, in that the said defendant, James Turner, did purchase, possess, dispense and distribute said drug which was not in or from the original stamped package.

In violation of Sections 4704(a), 4701, 4703, 7237 (a), U.S.C. Title 26.

A TRUE BILL.

/s/ [Illegible]
Foreman

/s/ David M. Satz, Jr.
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AFTERNOON SESSION—September 27, 1967

(Mr. Schlesinger summed up the case to the Jury in behalf of the defendant).

(Mr. Ellsworth summed up the case to the Jury in behalf of the Government).

COURT'S CHARGE TO THE JURY

THE COURT: Mr. Foreman, ladies and gentlemen, in this case as in every case which is tried to a Jury, the function of the Jury and the function of the Court, although both the functions cooperate to the achievement of the ultimate objective, namely, the doing of substantial justice, are nevertheless distinct and separate. You, or twelve of you, the twelve of you who will deliberate upon this case, will be the sole and exclusive judges of the facts, that is to say, upon you will devolve the responsibility and the sole responsibility of determining what the evidence has been and what evidences you will draw from that evidence, and in resolving those questions you will apply your God given and common sense and the background which each of you has passed through in the way of experience of your respective lives down to the present time. We inherit the jury system from the common law of England and we operate in this Court, and in most of our State Courts, under the Anglo-American law. Centuries of experience of that law, or in that law have proven that the most effective means of ascertaining the truth in litigation in civil or criminal is to call upon the twelve members of the citizenry of the area in which the case is to be tried, select them by lot as you are selected and leave in their hands after the presentation of the evidence by the litigants the resolution and determine, number one, of what that evidence is, what the facts were, actually and, in truth and what inferences are to be drawn therefrom.

The function of the Court, however, in the trial of a case with a Jury is first and foremost to see that justice is done, to see that the appropriate decorum is maintained, to see that only proper and admissible evidence finds its way to the Jury and finally to instruct the Jury upon the principles of law which must govern them in their determination of the facts from the evidence.

You will reach the ultimate and critical phase of the performance of your duties when you retire, when twelve of you retire to deliberate. I am now in the course of performing my last function in the case and that is to say the giving to you of the principles of law which I deem applicable to the evidence in the case.

Now, I've intimated and I repeat that you have the exclusive function of determining what the facts were and what inferences you are going to draw. But you can't do that in a vacuum because you must relate those determinations to the principles of law which must govern your achievement of the ultimate question in this case, and that is the guilt or innocence of the defendant. So you must accept the principles of law as I give them to you, even though you may believe that the law should be otherwise as I state it to be, or even though you may disagree with my statement or statements thereof.

The reason for that is that in every case tried by a combined Jury and Judge there exists an Appellate or Reviewing Court for the purpose of determining whether the Judge was in error in the principles of law which he gave to the Jury, but subject to a general supervisory power which the Trial Judge has, no one is called upon or will be called upon to review your findings on the facts and the ultimate conclusion.

Now, as I indicated, I believe, during the course of your selection, this is commonly referred to as a criminal case. It's a Federal criminal case and it is a Federal criminal case because there are no common law Federal crimes. Crimes in the Federal system—and this is a Federal Court—consist of the violation of the Federal statutes and, as you will see from the indictment in this case, which you will have with you during your deliberations, those particular statutes which underline

the accusations made by the Grand Jury against this defendant are predicated upon certain provisions of the Federal statutory law.

Before we get into specifics, before I undertake to burden you with the provisions of those statutes which are cited in the indictment, there are certain general principles which you must keep constantly in mind, constantly in mind from the time you have taken your oaths when you are impaneled as a Jury until you finally return to this courtroom with a unanimous verdict respecting each of the separate counts of the indictment, namely, a verdict of guilty or not guilty, not guilty or guilty. I purposely vary the alternative sequence of the possibilities upon the evidence in the case.

In the first place, your verdict must be unanimous. It must be an expression of the combined judgment of all twelve of you. Now, that doesn't mean that any single Juror or minority of Jurors should abdicate or cast aside or disregard his or their personal convictions respecting particular conclusions to be dawn from the evidence. Each of you has a God given mind and a background of common sense and it is the combination of all twelve Jurors which the law believes will result in a unified conviction on your parts of either the guilt or innocence of the defendant.

The reason why you will be locked up in a room by yourselves out of the hearing of everyone else and free of any possible contact from anybody else or with anybody else is so that you may really discuss and debate and deliberate upon the evidence which has been presented, considering in the light thereof the principles of law which the Court is endeavoring to give to you and then come out with a unanimous verdict.

As I said a moment ago, the desirability of having a unanimous verdict, which unanimous verdict will be the only way that the case may be disposed of, when I say unanimous I mean unanimous for either not guilty or guilty, is because if you don't have a unanimous verdict then the case, the trial of the case has been a waste of time and the case will have to be tried over again. Not only must your verdict be unanimous, ladies and

gentlemen, but you must constantly bear in mind—and I am sure you have continuously borne in mind since you took your oath—that this being a criminal case the burden is cast upon the Government which prosecutes the case in the name of all of the American people against the defendant to satisfy the Jury by the evidence beyond a reasonable doubt of the guilt of the defendant of the particular offense which the Jury is considering. I will mention in a moment the fact that there are several separate defenses charged in this indictment and I will endeavor to explain them to you.

The reason why, and I intimated this during the course of the selection of the Jury, the burden is cast upon the Government here of satisfying the Jury as the triers of the fact of the guilt of the defendant beyond a reasonable doubt is because from the moment which this or any other defendant in a criminal case pleads not guilty to an offense charged in the indictment, or an information, if it happens to be a case rendering an information appropriate, there figuratively speaking surrounds this defendant with a cloak, as it were, consisting of what we call the presumption of innocence. That simply means this: that having been accused by the Government through the Grand Jury of having committed certain offenses and having denied his guilt of those offenses he is presumed to be innocent and that presumption continues to surround him until the twelve members of the Jury through their foreman, having reached an unanimous verdict, return to the courtroom and announce that the Jury finds the defendant guilty of the particular offense under consideration. That is why the burden is cast upon the Government of satisfying the Jury by the evidence beyond a reasonable doubt.

What do we mean by the phrase beyond a reasonable doubt? For almost thirteen years I have been endeavoring to define the term "reasonable doubt" in a criminal case to numerous Juries and I am still not happy with the type of language used by the higher Courts for the guidance of subordinate Courts such as I am in the definition of reasonable doubt. But I am going to give it to you. It's all in English and I think we all understand

it. I am sure you know what the Courts mean when I give you this language. Hence, I am going to read to you.

"The term reasonable doubt is a term which is fairly well understood but not easily defined." That is a sort of a lame way to start a definition. But I continue: In fact, the Courts have experienced considerable difficulty with framing an adequate definition. It describes that state of mind which arises when, after a careful and impartial consideration of all the evidence and the inferences of which the evidence is reasonably susceptible, you, the members of the Jury cannot say that you have an abiding conviction to a moral certainty of the truth of the charge which you are considering. Reasonable doubt, however, is not a mere possible or imaginery doubt because everything relating to human affairs and depending upon oral evidence is open to some possible or imaginery doubt. The term reasonable doubt may be simply defined as a conscientious misgiving engendered in the mind either by the evidence or by the lack of evidence.

So, as I have already indicated in the application of these principles of law in the immediate case if, after a consideration of all the evidence and the inferences of which such evidence is reasonably susceptible, you are not convinced beyond a reasonable doubt of the guilt of the defendant of the particular offense which you are considering, you will return a verdict in defendant's favor, a verdict of not guilty. However, if after such a consideration of all the evidence and the inferences of which such evidence is reasonably susceptible you are convinced beyond a reasonable doubt of the guilt of the defendant of the particular offense which you are considering, you may, as the sole judges of the issues of fact and in the exercise of your conscientious judgment, return a verdict of guilty against the defendant of the particular offense which you are considering.

As I have intimated already, and I will not advert to that subject again, when you have reached the ultimate conclusion unanimously respecting the question of guilt or innocence with respect to the particular offense under consideration, you will consider and bear in mind in the

light of your determination of the evidence and the inferences to be drawn therefrom the principles of the statutory provisions upon which the offenses charged in this indictment are predicated. The reading of legislative enactments, whether they be Federal or State, is frequently very difficult to follow. It is usually quite monotonous. But when you boil it down to the essentials, the elements of the offenses stated in each of these statutory provisions, I believe you will have no difficulty in bearing them in mind.

As a matter of interest, we are calling upon two portions of the United States Code. The United States Code is the embodiment of the laws of the United States enacted by the Congress. Fortunately for us lawyers and Judges they are kept up to date so that we may keep abreast of the changes as they occur. The first statutory provision which is invoked in the indictment of this case is a section in what we call the Food and Drug Act. You have all heard of them and you know that we have a Federal Department charged with responsibility of supervising production and sale and use of food, drugs and I believe even the cosmetics in this country. The purpose of their function is to serve as far as possible the health and wealth of the people of the United States.

The first count of the indictment, that is to say, the first separate offense which is charged in this indictment —where is the indictment, Miss Costello? You will have it with you, ladies and gentlemen—charges that on or about June 1, 1967 at Weehawken, New Jersey—that is over here in Hudson County on the banks of the Hudson, and that location is in what we call the District of New Jersey which is coterminous with the State of New Jersey—James Turner, this defendant fraudulently, knowingly and unlawfully received, concealed and facilitated the transportation and concealment of a narcotic drug, that is, heroin hydrochloride. I charge you ladies and gentlemen of the Jury that heroin hydrochloride is a narcotic drug and the term is used in the statutory sections to which I am drawing your attention. This offense proceeds, or this charge of offense proceeds to allege that this reception, concealment and facilitation of the trans-

portation of this drug was after it had been fraudulently and unknowingly and unlawfully imported and brought into the United States contrary to law and that he, the said James Turner, the defendant here, then and there, that is to say while it was in his possession, well knew that the said narcotic drug had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law and that offense is charged to have been a violation of Section 174 of Title 21 of the United States Code. That is to say what is commonly known as the Food and Drug Act.

Now, the specific language of that section insofar as I deem it relevant to the evidence presented in this case provides in the pertinent part as follows: "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of these acts shall be guilty of the offense prescribed by the section."

Well, you may immediately say to yourselves in your mind what does the statute mean when it says in order to be guilty of a violation of this section the defendant must have knowingly brought or transported or had possession or concealed this drug knowing that it has been imported or brought into the United States contrary to law. Well, that question is a natural question for you to raise in your mind, but it is immediately answered in the following language in the very same section.

"Whenever," says the statute, "on trial for a violation of this section the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence," that is the bare possession, sufficient evidence "to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury."

Now, obviously there is no evidence in this case that this particular defendant knew that this cocaine and this

heroin had been imported in the United States contrary to law. The statute recognizing the impossibility of proving knowledge in these cases, and having in mind the welfare of the people which is the purpose of the Food and Drug Act, says that all you have to do, all the Government has to do is to show that there was possession of this drug by the defendant on trial and that evidence shall suffice to authorize conviction of violation of the statute, unless by the witnesses presented the possession of the drugs by this defendant under those circumstances was satisfactorily explained to the Jury. I charge you that there is no such evidence as that called for by the portion of the section which I have just completed reading.

I believe in an overabundance of caution, in view of the reference made by counsel for the defendant in his summation, the burden of proof cast upon the Government to prove all of the essential elements of the offense charged here does not require that any evidence, even though there is this presumption clause of the statute to be presented by the defendant. In other words, you must be satisfied by the totality of the evidence irrespective of the source from which it comes of the guilt of the defendant of the offense proscribed by the section which I read to you in order to find the defendant guilty of a violation of that section.

Now, I will not attempt in connection with each of these charged offenses to review the evidence, as counsel has well said or have well said the case has taken fortunately, a relatively short period of time to try. The evidence must be very fresh in the minds of all of you. You will recall, however, that the Government witnesses—and in referring to their testimony I do not give any greater credence to the evidence of any witness in the case, that is for you to determine, than to any other—have testified as to the circumstances under which this defendant, according to the Government's contention, was found to have in his possession under the front seat, which he had shortly before occupied in the automobile which had transported him through the Lincoln Tunnel to its exit in New Jersey, these particular quantities of

cocaine and heroin. In addition to finding this material or some of this material under the seat of the car, there is testimony to the effect that during the process of searching the occupants of the car, but before the actual personal search of this defendant had been commenced, a small package was seen to be thrown by this defendant with one of his hands on to the top of a wall in the vicinity of the exit from the top, and you may consider, if you believe that testimony, whether or not that act on the part of this particular defendant constituted evidence that this material was in his possession and had been transported by him from the State of New York to the State of New Jersey.

So you will consider all of the evidence, the provisions of the statute and the charge in the indictment under the first count, namely, the charge of the violation of Section 174 of Title 21. If you are convinced beyond a reasonable doubt in the light of the evidence and the provisions of the statute and the law as given you by the Court that the defendant here was guilty of that offense, you may return a verdict on the first count of guilty. Unless you are unanimously convinced by the evidence beyond a reasonable doubt of that guilt you will return a verdict under the first count of the indictment of not guilty in favor of the defendant.

Now, the third count is in all respects similar to the first count except that the substance which was involved in the alleged transportation or possession is different. Under count one we had cocaine and that is a narcotic drug. That is prohibited by Section 184 and under the third count we have heroin which I charge you is also a narcotic drug and falls within the category contemplated by Section 174 of Title 21. Therefore, if in the light of all the evidence as you find it to be, and the inferences which you have determined to draw therefrom, and under the language of the statute and the instructions of the Court you are convinced beyond a reasonable doubt that the defendant here was guilty of a violation of that section, you may return a verdict of guilty of the offense charged therein. On the other hand, unless you are so convinced unanimously beyond a rea-

sonable doubt your verdict must be a verdict of not guilty in favor of the defendant.

The other two counts of the indictment, ladies and gentlemen, are under an entirely unrelated set of statutes. I say unrelated, they are related by their terms but they are separately designated. They are what we all run into these days on April 15 and shortly before, the Internal Revenue laws. I assume you have heard of them. But they also proscribe certain excise taxes on various substances, including narcotic drugs. Counts two and four, which I will deal with together, but you will consider separately in the light of the evidence, allege that on June 1, 1967 at Weehawken in the District of New Jersey the same defendant, James Turner, did knowingly, willfully and unlawfully purchase, possess, dispense and distribute a narcotic drug under the second count heroin hydrochloride, under the fourth count cocaine hydrochloride, in that the said defendant James Turner did purchase, possess, dispense and distribute said drug which was not in or from the original stamped package. That is predicated upon the provisions of certain sections of Title 26 of the United States Code which embodies the Internal Revenue laws, and for your information your attention is directed to two sections of that Title 26, Sections 4704 and 4703, which I will read to you.

"It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped packages or from the original stamped package, and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facia evidence of a violation of this sub-section by the person in whose possession they may be found."

Now, the testimony presented by the Government here is uncontradicted that none of the material which was seized by the Treasury agents was either in or appeared to be taken from a package bearing the stamps required by the Internal Revenue laws. That requirement is in the preceding section to that which I read you, which requires that the stamps required by a later section for narcotic drugs shall be so affixed to the bottle or other

container as to securely seal the stopper covering or wrapper thereof and the later section, which deals directly with narcotic drugs as the subject of excise taxes, requires that the stamps imposed by two other sections of the same Title shall be obtained or provided by the Secretary of the Treasury or his delegate and shall be applicable to narcotic drugs and marijuana.

We are not concerned with marijuana here. With respect to my previous instruction that the substance which was seized from each of the packages by the Treasury Department agents on the occasion referred to in the indictment here were narcotic drugs is to be found in Section 4731 of Title 26 which defines narcotic drugs, and included in which definitions are the substances which the witnesses, which the Government chemist found to be contained in these packages. I don't think you are going to have any difficulty with counts two and four, ladies and gentlemen, because they charge violations of the Internal Revenue laws and the evidence in this case stands uncontradicted that the substances which were received by the Treasury agents in this case were not from the original stamped package and the packages thereof so seized bore no stamps as required by the statute.

So that in effect your problem, your principal problem here will be to determine whether or not certain quantities of heroin hydrochloride and cocaine hydrochloride which have been marked in evidence in this case were in the possession or under the control or both of the defendant in this case, James Turner, on June 1, 1967 when they were seized by United States Treasury agents at Weehawken in the District of New Jersey.

Now, I need not expatiate upon the principles which should govern your determination of the credibility of any of the witnesses. The reason we have a Jury is because they and they to the exclusion of every other instrumentality which might be conceived of for that purpose are the most effective means of finding out whether a person who takes an oath and sits on this witness stand is telling the truth. You may consider the interest of the witness in the outcome of the case, the

readiness and directness in which he responds to the questions put to him, the probability that he was in a position to know or observe, become aware of the facts which he undertakes to state, the existence or nonexistence of any motive on the part of the witness to depart from the truth. Whether or not as you observe the witness and listen to his story you would be inclined to take action or refrain from taking action based upon the story which he gives, and a variety of other considerations which I will not take the time to enumerate. But which will occur to your respective minds automatically.

Now, the Court, and I know the Jury, have cooperated and the Jury will continue to cooperate to accord a fair trial to this defendant. The Jury will keep constantly in mind during the course of its deliberations the burden which is cast upon the Government and which the Government accepts of satisfying the Jury beyond a reasonable doubt of the Government's contentions of guilt respecting the offenses charged in the indictment. You will also bear in mind that your verdict must be unanimous and each of you, I am sure, will give to his or her colleagues the benefit of his or her views respecting the evidence and the inferences to be drawn therefrom.

You will take successively each of the counts of the indictment because each count of the indictment charges a separate offense, therefore, you will be prepared through your foreman to announce four verdicts when you return to the courtroom. On count one when the clerk inquires of you you will say we find the defendant guilty or not guilty, as the case may be. On count one. On count two you will announce we find the defendant guilty or not guilty on count two. On count three you will announce we find the defendant guilty or not guilty on count three. On count four we find the defendant guilty or not guilty on count four.

The fact that your foreman will speak for the entire Jury will justify the Court and the clerk to assume that your verdict is unanimous. Of course, if counsel for the defendant desires to assure himself by asking that you be polled, that is to say, asking each one of you separately whether you concur in the foreman's verdict as

announced, that opportunity will be accorded to defense counsel. Now, in accord with the rules governing the trial of cases in this Court the Court is in receipt of written requests from the Government, no requests having been received from the defendant, to charge the following principles of law. I may or may not have already included the substance of each of these requests in my general charge to you. If I have, and if any of the questions which I will now charge may be repetitious of the substance of what I have said, you are not to attach to that fact, if you find it to be a fact, any impression that the Court considers the particular principles any more important in the case than any other principles of law which it has endeavored to give to you.

I charge the Government's requests as follows:

"Request to charge as to Count I wherein the defendant was charged with violating Title 21, United States Code, Section 174.

"Possession" of drugs within meaning of this section providing that unexplained possession of narcotics authorizes conviction can exist without physical contact so long as defendant has dominion and control over drug."

I so charge you.

"As to Counts I and III of the indictment charging the defendant with violation of Title 21, United States Code Section 174 "presumption" under this section relieves the Government from proving importation."

I so charge you.

"Constructive possession is enough to bring the presumption into play under this section providing that where defendant on trial for violation of this section is shown to have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless defendant explains it to satisfaction of the jury"

I so charge you.

"As to Counts II and IV of the indictment, they charge the defendant with violation of Title 26, United States Code Section 4704(a). One possessing, selling, or purchasing narcotics from package not stamped is guilty of offense.

I will add offense proscribed by that section.

I so charge you.

The Court will now hear in the presence of but out of the hearing of the Jury any objections from counsel respecting the Court's charge, either the main charge or the charge of the requests.

(Whereupon the following was had at side Bar.)

MR. SCHLESINGER: I believe, your Honor, in your charge there was the implication that the cocaine was part of the first count in the indictment. Actually I think the evidence shows that the cocaine, that is the item thrown up over the wall and the heroin was the item underneath the seat. I think the degree of possession is different.

THE COURT: I was aware of that. I believe I took care of it.

MR. ELLSWORTH: That is a factual question.

THE COURT: Lest there be any question I will expatiate on it. Anything else?

MR. SCHLESINGER: No.

(Whereupon the following was had in open court.)

THE COURT: I may have been confused with respect to where the cocaine was and where the heroin was, whether one was under the seat and the other on the wall. You heard the evidence and you will have the indictment with you so you will be able to tell. Therefore, if I have erroneously stated in my main charge that the heroin was where the cocaine should have been, or vice versa, you will disregard that.

(Alternate Jurors 13 and 14 excused.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Criminal No. 316-67

UNITED STATES OF AMERICA

v.

JAMES TURNER

JUDGMENT AND COMMITMENT—Filed November 17, 1967

On this 14th day of November, 1967 came the attorney for the government and the defendant appeared in person and [1] by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of [2] not guilty, and a verdict of guilty of the offense of unlawfully receiving, concealing and facilitating transportation and concealment of narcotic drug knowing said drug to have been fraudulently imported into the United States; purchasing, possessing, dispensing and distributing narcotic drug not in or from original stamped package

as charged [3]

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of [4] ten (10) years on Count 1; five (5) years on Count 2, to run concurrently with sentence imposed on Count 1; ten (10) years on Count 3, to run consecutively to sentence imposed on Counts 1 and 2; five (5) years on

Count 4, to run concurrently with sentence imposed on Count 3, but consecutively to sentence imposed on Counts 1 and 2.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Reynier J. Wortendyke
United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 17181

UNITED STATES OF AMERICA

v.

JAMES TURNER, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued September 24, 1968
Before BIGGS, FREEDMAN and VAN DUSEN, *Circuit Judges*

OPINION OF THE COURT—December 10, 1968

By VAN DUSEN, *Circuit Judge.*

Appellant, James Turner, was tried and convicted by a jury for violation of 21 U. S. C. § 174 [1] and 26 U. S. C. § 4704(a).[2] The Government adduced testimony by agents of the Federal Bureau of Narcotics that Turner threw

[1] Appellant was charged in Counts I and III with having "fraudulently, knowingly and unlawfully received, concealed and facilitated the transportation and concealment of a narcotic drug, . . . after the same had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law . . ." in violation of 21 U.S.C. § 174.

[2] Also, appellant was charged in Counts II and IV with knowingly, wilfully and unlawfully purchasing, possessing, dispensing, and distributing a narcotic drug, in that he did purchase, possess, dispense, and distribute the drug, not in or from the original stamped package, in violation of 26 U.S.C. § 4704(a).

away a tinfoil package containing cocaine hydrochloride after leaving his car and while in the custody of the police. During a search of appellant's vehicle, the agents discovered certain glassine envelopes which later were determined to contain heroin hydrochloride. None of the containers was affixed with the requisite tax stamps. The Government offered no evidence which would tend to show that the drugs possessed by the defendant were illegally imported into the United States; that the defendant had knowledge that the drugs were illegally imported; or that he did not purchase the drugs in or from their original stamped package. Instead, the case went to the jury on the presumptions embodied in Sections 174 [3] and 4704(a).[4]

The sole question before us is whether the presumptions contained in 21 U. S. C. § 174 and 26 U. S. C. 4704(a) are violative of the Fifth Amendment's guarantee against self-incrimination. Appellant contends that, although both of these sections heretofore have been held constitutional,[5] the recent cases of *Griffin* v. *California*, 380 U. S. 609 (1965), and *United States* v. *Jackson*, 390

---

[3] "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

[4] "(a) General Requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this section by the person in whose possession the same may be found."

[5] The presumption in 21 U.S.C. § 174 was held valid in *Yee Hem* v. *United States*, 268 U.S. 178, 185 (1925), and repeatedly thereafter in the Circuits. E.g., *United States* v. *Armone*, 363 F.2d 385, 391-2 (2nd Cir), cert. den. 385 U.S. 957 (1966); *Bradford* v. *United States*, 271 F.2d 58, 61 (9th Cir. 1959); *United States* v. *Brown*, 207 F.2d 310, 312 (7th Cir. 1953); *Dear Check Quong* v. *United States*, 160 F.2d 251, 252 (D.C. Cir. 1947). The constitutionality of 26 U.S.C. § 4704(a) was upheld in *Goode* v. *United States*, 149 F.2d 377 (D.C. Cir. 1947).

U. S. 570 (1968), compel a ruling that the presumptions violate defendant's Fifth Amendment privilege.

Griffin decided that comment by the court on an accused's failure to testify constitutes a "penalty imposed by courts for exercising a constitutional privilege," [6] and held that such comment violates the self-incrimination clause of the Fifth Amendment. The court there pointed out that where a defendant fails to take the stand, although an inference could be drawn that he is guilty of the crime being tried, an alternative inference might be drawn that he has prior convictions, since to testify would enable the prosecution to introduce any such convictions for impeachment purposes (pp. 614-15). *Jackson* held the death penalty clause of the Federal Kidnapping Act unconstitutional since it discouraged the assertion of the right to demand a jury trial and the right to plead not guilty. Appellant's thory is that the statutory language, when used in instructions to the jury, is the substantial equivalent of unfavorable comment prohibited by *Griffin* and discourages the right of a defendant to remain silent just as the death penalty provision, struck down in *Jackson*, was held to discourage a plea of not guilty and the demand for a jury trial.

The presumptions provided by 21 U. S. C. § 174 and 26 U. S. C. § 4704(a) shift the burden of going forward with evidence once the Government has established possession (cf. *Roviaro* v. *United States*, 353 U. S. 53, 63 (1957)) [7] and do not violate the self-incrimination clause

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[6] *Griffin* v. *California*, 380 U.S. 609, 614 (1965).

[7] In the *Yee Hem case, supra*, the court said at pages 184-5:

> "Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. . . .
>
> ". . . The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses."

(Continuing with the language quoted below at page 4.)

of the Fifth Amendment. *Griffin* and *Jackson* are not controlling because the language of §§ 174 and 4704(a) neither constitutes unfavorable comment on the accused's failure to testify, nor does it have an "unnecessary and therefore excessive" chilling effect on the exercise of that privilege, see *Jackson, supra,* at 582.

Any support which defendant may secure from *Griffin* in this situation must be substantially reduced by the Supreme Court's decision in *United States* v. *Gainey,* 380 U. S. 63 (1965), decided less than two months before *Griffin,* and which upheld the constitutionality of 26 U. S. C. § 5601(b)(2),[8] containing a presumption similar to those here. In *United States* v. *Armone, supra,* the Second Circuit specifically held that a charge under § 174 was not an adverse comment on the defendant's failure to take the stand, depriving him of his Fifth Amendment privilege.

Gainey does not require reversal as long as there is "neither allusion nor innuendo based on the defendant's decision not to take the stand."[9] That ground is absent here since the trial court specifically charged that "the burden of proof cast upon the government to prove all of the essential elements of the offense charged here does not require that any evidence, *even though there is this presumption clause of the statute,* be presented by the defendant" (emphasis supplied).[10]

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[8] Under 26 U.S.C. § 5601(b)(2) the jury can infer guilt of the crime of illegally carrying on the business of a distiller without bond merely from evidence of the defendant's presence at the site of the still.

[9] 380 U.S. 63, 71.

[10] The court also charged that the jury might (not that it must) return a verdict of guilty if it was convinced beyond a reasonable doubt, using this language:

> "Therefore, if in the light of all the evidence as you find it to be, and the inferences which you have determined to draw therefrom, and under the language of the statute and the instructions of the Court you are convinced beyond a reasonable doubt that the defendant here was guilty of a violation of that section, you may return a verdict of guilty of the offense

Appellant claims that his exercise of the privilege against self-incrimination was discouraged by the presumption in question and he is therefore entitled to reversal under the *Jackson* doctrine. We do not agree. If the exercise of the privilege is discouraged, it is because the

> ". . . accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." [11]

For the foregoing reasons, the judgment of conviction will be affirmed.

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charged therein. On the other hand, unless you are so convinced unanimously beyond a reasonable doubt your verdict must be a verdict of not guilty in favor of the defendant."

[11] *Yee Hem* v. *United States*, 268 U.S. 178, 185 (1925).

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,181

UNITED STATES OF AMERICA

vs.

JAMES TURNER, APPELLANT

(D. C. Criminal No. 316-67)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: BIGGS, FREEDMAN and VAN DUSEN,
Circuit Judges

JUDGMENT—December 10, 1968

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 17, 1967, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

SUPREME COURT OF THE UNITED STATES

No. 1387 Misc., October Term, 1968

JAMES TURNER, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Third Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1474 and placed on the summary calendar and set for oral argument immediately following No. 1473.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 2, 1969

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 190

JAMES TURNER,

Petitioner,

vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

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OCTOBER TERM, 1969

No. 190

JAMES TURNER,

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vs.

UNITED STATES.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

Reference to Opinions Below

This matter was tried in the United States District Court for the District of New Jersey before the Honorable Reynier J. Wortendyke, Jr., U.S.D.J., and a jury. On appeal, the United States Court of Appeals for the Third Circuit affirmed the jury's verdict of guilty in an opinion reported at 404 F. 2nd 782 (1968).

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered on December 10, 1968. (A. 30) The jurisdiction of this Court is conferred by the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U.S.C. §1254 (1). A timely Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was granted by this Court on June 2, 1969.

Statutes Involved

1. Title 21, United States Code, Section 174 reads as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237 (c) of the Internal Revenue Code of 1954) the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

"For provision relating to sentencing, probation, etc., see section 7237 (d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, §2 (c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, §1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, §§1, 5 (1), 65 Stat. 767; July 18, 1956, c. 629, Title I, §105, 70 Stat. 570."

2. Title 26, United States Code, Section 4704 (a) reads as follows:

"(a) It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

"(b) The provisions of subsection (a) shall not apply—

(1) To any person having in his or her possession any narcotic drugs or compounds of narcotic drug which have been obtained from a registered dealer in pursuance of a written or oral prescription referred to in section 4705 (c) (2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722;

and where the bottle or other container in which such narcotic drug or compound of a narcotic drug may be put up by the dealer upon said prescription bears the name and registry number of the druggist, and name and address of the patient, serial number or prescription and name, address and registry number of the person issuing said prescription; or

(2) To the dispensing, or administration, or giving away of narcotic drugs to a patient by a registered physician, dentist, veterinary surgeon or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subpart of the drugs so dispensed, administered, distributed, or given away.

"Aug. 16, 1954, c. 736, 68A Stat. 550; Aug. 31, 1954, c. 1147, §8, 68 Stat. 1004."

Questions Presented

1. Does the provision of 21 U.S.C. §174 stating that possession of a narcotic drug shall be sufficient evidence to authorize conviction thereunder unless the defendant explains such possession to the satisfaction of the jury, unconstitutionally invade the defendant's privilege against compulsory self-incrimination?

2. Does the provision of 26 U.S.C. §4704 (a) stating that absence of taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of said subsection by the person in whose possession the drugs may be found, unconstitutionally invade the privilege against compulsory self-incrimination?

Statement of the Case

Defendant was convicted on two counts of an indictment charging violation of certain sections of the Narcotic Drug Import and Export Act (A. 7, 8), and on two counts alleging violations of certain sections of the Internal Revenue Code. (A. 7, 8) Defendant was sentenced to a total of twenty years in prison. (A. 23, 24)

Convictions were for unlawfully receiving, concealing and facilitating transportation and concealment of narcotic drug knowing said drug to have been fraudulently imported into the United States; purchasing, possessing, dispensing and distributing narcotic drug not in or from original stamped package.

The Government offered no evidence which would tend to show that the drugs possessed by the defendant were illegally imported; that the defendant had knowledge that the drugs were illegally imported; or that he did not purchase the drugs in or from their original stamped package. Instead, the case went to the jury on the presumptions embodied in Sections 174 and 4704 (a). The defendant did not testify in the case.

The convictions were affirmed by the United States Court of Appeals for the Third Circuit (A. 30) which rejected defendant's argument that the provisions in question unlawfully invade the privilege against self-incrimination.

Summary

The presumption embodied in 21 U.S.C. §174, by exacting a penalty for exercising the privilege against compulsory self-incrimination, places an unconstitutional burden on that privilege within the principles of law announced in the recent opinions in *Griffin* v. *California,* 380 U.S. 609 (1965) and *United States* v. *Jackson,* 390 U.S. 570 (1968). The burden arises because the presumption operates on evidence of possession of narcotic drugs—which is not forbidden by the statute and which, without the presumption, is insufficient for conviction—and constitutes it sufficient evidence for conviction of unlawful importation or knowingly dealing in unlawfully imported narcotic drugs unless the defendant shall explain such possession to the satisfaction of the jury. In such circumstances accused loses his unfettered discretion to invoke or waive the privilege against compulsory self-incrimination.

Possession of narcotic drugs without taxpaid stamps thereon is, pursuant to 26 U.S.C. §4704 (a), prima facie evidence of the conduct prohibited by the subsection. But possession of such drugs, without more, is not the conduct prohibited. And the Congressional declaration that possession may be so construed impermissibly restricts the privilege against compulsory self-incrimination in the same manner as does the aforesaid presumption.

ARGUMENT

The Provision of 21 U.S.C. §174 Stating That Possession of a Narcotic Drug Is Sufficient Evidence to Authorize Conviction Thereunder Unless the Defendant Explains Such Possession to the Satisfaction of the Jury Is Unconstitutional Because It Discourages the Exercise of the Right Against Compulsory Self-Incrimination.

21 U.S.C. §174 basically proscribes, in broad and sweeping terms, illegally importing narcotic drugs into the United States and dealing in drugs knowing of their illegal importation. It does not purport to forbid mere possession. However, by legislative fiat evidence of possession is tantamount to evidence of the proscribed conduct.

The privilege against compulsory self-incrimination is "as broad as the mischief against which it seeks to guard," *Counselman* v. *Hitchcock,* 142 U.S. 547, 562 (1892) and ". . . the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964); *Miranda* v. *Arizona,* 384 U.S. 436 (1966). A privilege of these dimensions is denied to one accused under this statute. It is patently foolish to assert that, faced with the knowledge that his silence would lead to the instruction actually given pursuant to the presumption (A. 15, 16), petitioner herein was able to invoke or waive his privilege "in the unfettered exercise of his own will." And just as clearly the fact that petitioner did not testify does not indicate proper observance of his constitutional right in view of the penalty exacted. That penalty is embodied in the charge given to the jury

that ". . . there is no such evidence as that called for" (A. 16) by the presumption in question.

The operation of the presumption is not constitutionally authorized by analogy to the situation where ". . . a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence" as suggested by *Yee Hem* v. *United States,* 268 U.S. 178, 185 (1925), on which the opinion below primarily relied. There was no evidence of unlawful importation or petitioner's knowledge thereof presented (A. 26). The existence of these basic elements of the crime was inferred from the presumption embodied in Section 174 and not from the "force of circumstances," *Yee Hem, supra,* erected by direct or indirect factual evidence. "It is clear beyond doubt that the fact of possession alone is not enough to support an inference that the possessor knew it had been imported." *Leary* v. *United States,* 23 L. Ed. 2nd 57, 37 United States Law Week 4397, 4411 (1969) (concurring opinion of Justice Black).

It is no answer to say that accused need not himself testify but can adduce testimony from others. If the reason for the presumption is that the government cannot be expected to discover that which is known only to the defendant, then it is clear that defendant must testify and cannot rely on the testimony of others. And, if the reason be that the accused alone knows who can testify to circumstances absolving him of the crimes charged, the government can find such witnesses with proper investigation. As was so forcefully noted by Justice Black dissenting in *United States* v. *Gainey,* 380 U.S. 63, 83, 94 (1965):

". . . Instead of supporting the constitutionality of such a use of statutory presumptions, however, I think this

> argument based on necessity and convenience points out its fatal defects. I suppose no one would deny that the Government's burden would also be made lighter if the defendant was not represented by counsel, compare Gideon v. Wainwright, 372 U.S. 335, 9 L ed 2nd 799, 83 S. Ct. 792, 93 A.L.R. 2d 733, or if the jury could receive and consider confessions extorted by torture, compare Brown v. Mississippi, 297 U.S. 278, 80 L ed 682, 56 S. Ct. 461, or if evidence obtained from defendants through illegal searches and seizures could be used against them, compare Mapp v. Ohio, 367 U.S. 643, 6 L ed 2d 1081, 81 S. Ct. 1684, 84 A.L.R. 2d 933, but this Court has not hesitated to strike down such encroachments on those constitutional rights. . . ."

As this Court has had occasion to say, there is an alternative to the presumption of guilt that may be drawn from the silence of accused:

> It is not every one who can safely venture on the witness stand though entirely innocent of the charge against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him. It is not every one, however honest, who would, therefore, willingly be placed on the witness stand. *Wilson* v. *United States,* 149 U.S. 60, 66 (1893).

In *Griffin* v. *California,* 380 U.S. 609 (1965), this Court considered a rule of evidence pursuant to which the State could mention to the jury for its consideration the failure of the accused to testify. The rule was held unconstitu-

tional because "It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." 380 U.S. at 614. In this case the "penalty" is imposed by the statute rather than by the Courts but this distinction is irrelevant for the *Griffin* decision turned on the result, rather than the source, of the penalty imposed for the exercise of the privilege against compulsory self-incrimination. It is equally true here that a price was exacted for defendant's silence. *Griffin* alone requires reversal of the decision below.

That portion of the Federal Kidnapping Act which provided for the death penalty if the verdict of the jury so recommended was before this Court in *United States* v. *Jackson*, 390 U.S. 570 (1968). This Court voided that portion of the Act because:

> . . . The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional. 390 U.S. at 581.

The Court went on to say:

> . . . The evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to

> impose an impermissible burden upon the assertion of a constitutional right. (Emphasis in original.) 390 U.S. at 583.

The privilege against compulsory self-incrimination is no less precious than the right to plead not guilty and the right to a trial by jury. It is entirely appropriate to apply the same rationale to this case. The presumption embodied in 21 U.S.C. §174 likewise "chills" the exercise of a constitutional right and "encourages" its abandonment. The conclusion is inescapable that the *Jackson* decision requires reversal.

It is also noteworthy that in *Griffin* accused remained silent as in *Jackson* defendant entered a plea of not guilty and demanded a trial by jury. Thus the fact that petitioner herein remained silent and his privilege against compulsory self-incrimination was accorded him to that narrow and constitutionally deficient extent does nothing to take this case from principles of law announced in the cited authorities.

It is enough to say of *United States* v. *Armone,* 363 F. 2nd 385 (2nd Cir.), cert. den. 385 U.S. 957 (1966) and *United States* v. *Gainey,* 380 U.S. 63 (1965) upon which the opinion below relies that both were decided prior to *United States* v. *Jackson, supra,* and that neither considered or decided the question now before the Court.

The Provision of 26 U.S.C. §4704 (a) Stating That Absence of Taxpaid Stamps From Narcotic Drugs Shall Be Prima Facie Evidence of a Violation of Said Subsection by the Person in Whose Possession the Drugs May Be Found Is Likewise Unconstitutional Because It Discourages the Exercise of the Right Against Compulsory Self-Incrimination.

26 U.S.C. §4704 (a) prohibits the purchase, sale, dispensing or distribution of narcotic drugs except in or from the original stamped package. Certainly, under the statute, possession of narcotic drugs without taxpaid stamps is not necessarily unlawful. But, as in the case of 21 U S.C. §174, mere possession, clearly insufficient evidence for a conviction, may be, by Congressional mandate, without more, the basis of a conviction for violation of the subsection in question.

Although the wording of this subsection differs from that of the presumption discussed earlier, the effect is the same. The Court charged the jury, after reading the statute in question to them, in effect, that if the drugs "were in the possession or under the control" (A. 19) of petitioner a verdict of guilty could be returned. At trial, petitioner was aware that proof of possession, although not sufficient evidence without more to convict, would entitle the government to the charge just recited. As a result, he was obviously unable to invoke or waive his privilege against compulsory self-incrimination "in the unfettered exercise of his own will." *Malloy* v. *Hogan, supra; Miranda* v. *Arizona, supra.*

The restriction thus imposed on his constitutional privilege was rooted directly in the statute and was not the only

inference to be drawn from the factual evidence available to the jury. Such burden is not constitutionally permissible by reason of necessity and amounts to a penalty imposed for exercising a right as did the rule abrogated in *Griffin* v. *California, supra,* and has a substantial tendency to discourage assertion of the privilege and needlessly encourage a waiver thereof as did the statutory provision put aside in *United States* v. *Jackson, supra.* As before, the last cited cases inescapably lead to a reversal in the present case. Earlier cases relied on by the Court below in rejecting this constitutional challenge are not controlling as they did not consider the precise question involved here.

Conclusion

Petitioner, therefore, respectfully urges this Court to set aside and reverse his convictions on all counts of the indictment.

Respectfully submitted,

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On the brief:

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 190

JAMES TURNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF CLEVELAND BURGESS URGING REVERSAL

Steven R. Rivkin
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Attorney for Cleveland Burgess
(Appointed by the United States Court of Appeals for the District of Columbia Circuit)

August 15, 1969

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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No. 190

JAMES TURNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE ON BEHALF OF CLEVELAND BURGESS URGING REVERSAL

INTEREST OF AMICUS CURIAE

Cleveland Burgess was convicted in November 1967 in the United States District Court for the District of Columbia on six counts for narcotics violations arising from two alleged sales of heroin. With respect to each sale, a jury

*Pursuant to Rule 42, paragraph 2, there have been lodged with the Clerk the written consents of counsel for the petitioner and of the Solicitor General of the United States to the filing of this Brief Amicus Curiae.

found Burgess guilty of violating the three statutory provivions involved in this case and in No. 189, *James Minor v. United States*–21 U.S.C. § 174 (facilitating the concealment of an unlawfully imported narcotic drug); 26 U.S.C. § 4704a (sale of a narcotic drug not in or from the original stamped package); and 26 U.S.C. § 4705a (transfer of a narcotic drug without a written order on an official order form). His petition for leave to appeal in forma pauperis having been granted, Burgess' case (D.C. Cir. No. 21,745) is one of several narcotic convictions[1] now under review for possible constitutional defects by the United States Court of Appeals for the District of Columbia Circuit.

In the pending review in the Court of Appeals, Burgess has filed a brief which raises constitutional issues including, *inter alia*, the issues now posed to this Court in the instant case and in No. 189. In the light of this identity of issues, the United States Attorney for the District of Columbia moved on August 7, 1969 for extension of his time for filing his responsive brief in various cases there on review until the Solicitor General has filed his brief in the Supreme Court. "In this way," the Government informed the Court of Appeals, "appellee will be able to present the same arguments both to the Supreme Court and to this court [the Court of Appeals]."

Since the issues in this Court replicate the issues in Burgess' case, it is unlikely that the Court of Appeals will make any determination independently and in advance of this Court's disposition of the instant cases. It is therefore of utmost importance to Burgess that this Court consider argument on every subsidiary question fairly comprised within the questions here presented for review. Moreover, since there are other related issues possibly not within the issues explicitly raised in the briefs of petitioners[2] it is also

[1]The other pending cases are *Bowman v. United States*, D.C. Cir. No. 22,546, *Collins v. United States*, D.C. Cir. No. 22,770, and *Mills v. United States*, D.C. Cir. No. 23,020.

[2]These arguments involve the consistency of statutory presumptions with the defendant's right to due process of law (Arg. IA) and

of utmost importance that the decisions of this Court be informed with respect to these considerations. To these ends, this brief amicus curiae is respectfully submitted.

ARGUMENT

SUMMARY OF ARGUMENT

The Constitution is violated by a conviction based on the statutory presumption in 21 U.S.C. § 174, providing that–

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Specifically, the Constitution is violated in three respects, as follows.

First, the presumption violates due process of law under the Fifth Amendment insofar as it authorizes a jury to convict upon the basis of two inferences from mere possession of a narcotic drug that are rationally impermissible, namely that the drug had been imported unlawfully to the United States and that the defendant knew of such unlawful importation. (Arg. IA)

Second, the presumption violates the Fifth Amendment's protection against self-incrimination at trial, once possession is shown, by making conviction depend upon whether the defendant testifies to "explain . . . the possession to the satisfaction of the jury", thereby providing evidence which could serve as the basis for other Federal or state criminal prosecutions. (Arg. IB)

Third, in serving as the basis for jury instructions that authorize conviction without proof of key elements of the offense (unlawful importation and knowledge thereof) the

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trial by jury (Arg. IC) and the role of 26 U.S.C. § 4704a as a key element in a self-incriminatory scheme for narcotics control (Arg. IIB).

presumption violates a defendant's right to trial by jury pursuant to Article III, section 2, and the Sixth Amendment to the Constitution. (Arg. IC)

In addition, the requirement of 26 U.S.C. § 4704a that no narcotic drug be purchased, sold, dispensed or distributed except in the original stamped package, individually and as part of an overall statutory scheme, is a blatant device to suppress petitioner's right to be free from self-incrimination. It operates at trial to force the defendant to offer testimony to rebut the inference of violation, arising from the statutory presumption therein (Arg. IIA), and, in its terms, it also effects disclosure for the purpose of compelling registration and payment of an occupational tax, in further violation of petitioner's right to be free of self-incrimination (Arg. IIB).[3]

I.

CONVICTION UPON THE STATUTORY PRESUMPTION IN 21 U.S.C. s 174 VIOLATES CONSTITUTIONAL PROTECTION OF DUE PROCESS OF LAW, THE DEFENDANT'S PRIVILEGE AGAINST SELF-INCRIMINATION, AND TRIAL BY JURY.

Petitioner Turner was convicted for facilitating the concealment of narcotic drugs unlawfully imported into the United States, known to have been unlawfully imported, pursuant to 21 U.S.C. § 174. With respect to the key elements of the offense—unlawful importation and knowledge of unlawful importation—no evidence whatsoever was introduced by the prosecution. 404 F.2d 782, 783 (1968). Conviction rested solely on the presumption, embodied in the judge's instructions to the jury which was drawn from the second paragraph of the statute—

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[3] Additional considerations pertinent to Burgess' appeal to the Court of Appeals concern the self-incriminatory effect of 26 U.S.C. § 4705a, individually and as a part of an overall statutory scheme, pointed out in the brief of the petitioner in No. 189.

> "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The Supreme Court has recently held unconstitutional a "virtually identical" presumption applied to another narcotic drug (marihuana). *Leary v. United States*, 395 U.S. 6, 44 (1969). The decision in *Leary* held that the statutory presumption, insofar as it displaced requirement for proof that the defendant knew the drug to have been unlawfully imported, violated due process of law, while also raising, though finding no need to dispose of, the possibility that the presumption further violated due process with respect to the requirement for proof of unlawful importation.

Applying the same measure to *Turner*, the presumption violated due process under the Fifth Amendment. Moreover, by coercing the petitioner to testify and thus expose himself to further prosecutions, to explain "possession to the satisfaction of the jury", the presumption violated the petitioner's right to be free at trial from self-incrimination under the Fifth Amendment. Finally, by excising the core of the statutory offense from the prosecution's responsibility for proof, the presumption operated to deny the petitioner his right to trial by jury, guaranteed by Article III and the Sixth Amendment to the Constitution.

A. The Statutory Presumption Violates Due Process of Law

The statutory presumption of 21 U.S.C. § 174, for many years protected from due process challenge by the holding of *Yee Hem v. United States*, 268 U.S. 178 (1925), that the presumption is reasonable applied to smoking opium, has recently been fundamentally shaken by the Supreme Court's decision in *Leary*, *supra*, regarding the "virtually identical" presumption applied to marihuana in 21 U.S.C. § 176a. The

Court was careful to reserve the final downfall of *Yee Hem* for a later case, stating that "we intimate no opinion whatever about the continued validity of the presumption relating to 'hard' narcotics", 395 U.S. at 45, fn. 92, but it pointed to a fatal flaw in the reasoning of *Yee Hem*—the failure to consider that "it is incumbent upon the prosecution to demonstrate that the inference [of statutory violation] is permissible before the burden of coming forward could be placed upon the defendant", 395 U.S. at 45, according to the holding of the Supreme Court in *Tot v. United States*, 319 U.S. 463, 469.

The teaching of *Tot* was controlling in *Leary's* invalidation of the statutory presumption relating to marihuana, and was quoted with favor at 395 U.S. at 33-34—

> "Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience. This is not to say that a valid presumption may not be created upon a view of relation broader than a jury might take in a specific case. But where the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them it is not competent for the legislature to create it as a rule governing the procedure of courts." 319 U.S. at 467-68.

See also *United States v. Gainey*, 380 U.S. 63 (1965), and *United States v. Romano*, 382 U.S. 136 (1965). Where *Yee Hem's* finding of reasonableness in the legislative design of Section 174 was premised on its view that the person who obtains an "outlawed commodity" may reasonably be required to rebut at his peril "the natural inference of unlawful importation or your knowledge of it. . ." 268 U.S. at 184, *Leary* "refus[ed] to follow this aspect of the reasoning in *Yee Hem*" 395 U.S. at 45-46, fn. 92, and flatly endorsed the view expressed in *Tot* that the prosecu-

tion must demonstrate the inference is rationally permissible before the presumption may be applied.

The prosecution in this case has fallen into the same pitfalls with respect to "hard" narcotics that defeated the Government's case in *Leary*. The presumption was essential to conviction because no evidence was introduced to show that the drug petitioner is alleged to have sold was unlawfully imported and that the petitioner knew it to have been unlawfully imported–central elements of the charge.[4] Under *Leary's* restatement of the applicable measure of constitutionality, the Government should have introduced evidence "to demonstrate that the inference was permissible before the burden of coming forward"–the burden of satisfactorily explaining possession–"could be placed upon the defendant". 395 U.S. at 45.

Without such a showing to substantiate the inferences of unlawful importation and knowledge thereof, it was error to allow the case to go to the jury on the presumption, and the conviction cannot be sustained on appeal. Moreover, there are compelling indications that the reasonableness of both inferences cannot meet the "rational connection" test restated in *Leary*–

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[4] In *Turner* the judge charged the jury as follows:

> "Now obviously there is no evidence in this case that this particular defendant knew that this cocaine and this heroin had been imported in the United States contrary to law. The statute recognizing the impossibility of proving knowledge in these cases, and having in mind the welfare of the people which is the purpose of the Food and Drug Act, says that all you have to do, all the Government has to do, is to show that there was possession of this drug by the defendant on trial and that evidence shall suffice to authorize conviction of a violation of the statute unless by the witnesses presented the possession of the drugs by this defendant under those circumstances was satisfactorily explained to the jury. I charge you that there is no such evidence as that called for by the portion of the section which I have just completed reading." (Tr. 15-16)

> "The upshot of *Tot*, *Gainey* and *Romano* is, we think, that a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary', and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36.

Can it be said "with substantial assurance" that unlawful importation and petitioner's knowledge of unlawful importation flow from his mere possession of a narcotic drug?

With respect to *unlawful importation* of the drugs in the petitioner's possession, a number of very real alternatives are available to vitiate "substantial assurance" of unlawful importation. Although it is clearly unlawful to import or bring any narcotic drug into the United States except such amount of crude opium coca leaves as the Commissioner of Narcotics is authorized to prescribe by regulation, and no crude opium may be imported or brought in for the purpose of manufacturing heroin (21 U.S.C. § 173), this statutory bar by no means blocks all the possible alternative origins of the drugs in the petitioner's possession. Other alternative origins of heroin, for example, each of which represents a reasonable (if not inevitable) source, include:

1. *Lawful Importation of Heroin.* As the Court of Appeals for the Ninth Circuit said in *Hernandez v. United States*, 300 F.2d 114 (1962):

> "[I]t cannot be said that all heroin now outstanding in this country is in fact illegally imported since Congress in 1960 enacted a statute providing: 'Notwithstanding the provisions of . . . any other law, the Secretary [of the Treasury] . . . may in his discretion authorize the importation of any narcotic drug . . . for delivery to officials of the United Nations, of the Government of the United States, or of any of the several States, or to any person licensed or qualified to be licensed under section 8 of this Act, for scientific purposes only.' Act of April 22, 1960, § 16, 74 Stat. at page 67 (21 U.S.C. § 513).

See S. Rep. No. 1077, 86th Cong., 2d Sess., 2 U.S. Cong. & Ad. News 1960, at page 1887." 300 F.2d at 119, fn. 11.

See also 21 C.F.R. § 306.3, which lays down discretionary authority under which the Director, Bureau of Narcotics and Dangerous Drugs, may make heroin domestically available. According to the strict construction appropriate for such a penal statute, it would not follow that the drugs in petitioner's possession were unlawfully imported, even assuming the petitioner had come by such drugs without an appropriate scientific-purposes-only license.

2. *Lawful Importation of Source Material, Subsequent Deviation and Manufacture into Heroin.* Although no crude opium may be imported for the purpose of manufacturing heroin, deviation after lawful importation would not necessarily violate the import control statute. For example, in the year 1967, according to the U.S. Treasury, Bureau of Narcotics, there were 2,181 thefts of narcotic drugs totaling 145.89 kg. in weight, a new record quantity. U.S. Bureau of Narcotics, *Report on the Traffic in Opium and Other Dangerous Drugs* (1967), p. 22. The same report lists a considerable volume of lawful domestic processing of convertible opium derivatives, 3,713 kg. of medicinal opium and 715 kg. of morphine (1966 figures), *id.* at 41. The final step in the process, manufacture of heroin from opium or morphine, is a simple and well-known chemical process–

> "Raw morphine can be refined and converted into almost pure heroin (90 to 97 per cent) with relatively simple means and material with the help of products the sale of which is uncontrolled, and without the need for any special adaptation of the premises used; in this way many kilos can be produced weekly.
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> "A bathroom or kitchen fitted with town gas or butane gas or with electricity is sufficient for the purpose." See C. Vaille and E. Bailleul, "Clandestine Heroin Laboratories," in *Bulletin of Narcotics* (United Nations), Vol. V, no. 4, Oct.-Dec. 1953, p. 1.

That these processes are not unknown to heroin dealers in the United States–and to the Bureau of Narcotics as well[5]–is reflected in the candid official U.S. report of a particular seizure of five ounces of high-grade heroin "believed to have come from a clandestine laboratory." *Report on Traffic in Opium and Other Dangerous Drugs* (1946), p. 19. See also *Report on Traffic in Opium and Other Dangerous Drugs* (1954), p. 4.

3. *Domestic Production of Opium and Manufacture into Heroin.* Though official statistics of domestic growth of the opium poppy do not appear to be currently reported, the amenability of the plant to cultivation has long been recognized and was a prime target of Congressional enactment of the taxing provisions of the Harrison Narcotics Act of 1914 (26 U.S.C. § 4701). Justifying that tax, Congressman Harrison said–

> "The act approved Feb. 9, 1909 prohibits the importation of opium except for medicinal purposes, and so makes it illegal for any one to import crude opium into the United States and so manufacture smoking opium. But it is possible for those desiring to do so to cultivate the poppy in several of the states (notably those of the Pacific slope), produce opium therefrom, and under the Act of October 1, 1890, secure a license and manufacture such domestically produced opium into smoking opium for local consumption and interstate traffic. Owing to the high price which smoking opium now commands as the result of its legal exclusion from the U.S. certain persons have declared their intention of producing opium in the U.S. and manufacturing it into smoking opium. Should this intention be carried out it would be a direct defeat of the chief object of the Act. . ., and may be checked by so amending

[5]Note that the prospect of domestic manufacture is also recognized within the regulatory scheme of 48 states and the District of Columbia as expressed in § 2 of the Uniform Narcotic Drug Act. See 9B Uniform Laws Ann. 409-410 (1966).

> the Act of October 1, 1890 as to impose a prohibitive internal revenue tax on all smoking opium manufactured in the United States from domestic crude opium. . ." H. Rep. 22, 63d Cong., 1st Sess., 1913, p. 1-2.

Moreover, to provide further teeth to controls over domestic production, Congress enacted the Opium Poppy Control Act of 1942, 21 U.S.C. §§ 188 *et seq.* providing a comprehensive licensing scheme for domestic production of the opium poppy. For indication that evil Congress intended to curb has nonetheless continued, note the misfortunes of the defendant in *Az Din v. United States*, 232 F.2d 283 (C.A. 9), *cert. denied*, 352 U.S. 827 (1956). See also *Stutz v. Bureau of Narcotics*, 56 F. Supp. 810 (N.D. Cal., 1944).

Thus, derived from either licensed or unlicensed domestic growth, the possibility of 100% domestic production is not to be discounted.

4. *Domestic Synthesis of Heroin.* For an ingenious, but no less relevant, example of an effort to synthesize morphine and cull opium from unregulated substances, see *Liss v. United States*, 137 F.2d 996, *cert. denied*, 320 U.S. 773 (1943).

All of the foregoing represent illustrative ways in which heroin may have entered petitioner's possession other than by unlawful importation. Together they cumulate to vitiate the "substantial assurance" which *Leary* requires must underly the inference of unlawful importation from mere possession. It may be that a careful study of the probabilities would substantiate the validity of the presumption in fact, but this record provides absolutely no basis for such an inference, which, as *Leary* teaches, cannot therefore be sustained.

Moreover, upon such showing of the unsubstantial basis for the presumption of unlawful importation, *Leary* dictates that the presumption of *knowledge* must also fall, unless the Court can be persuaded that

> "a majority of [heroin] possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that *their* [heroin] was grown abroad." 395 U.S. at 42.

Without any indication of the petitioner's knowledge, and without any profile of the knowledge of the nation's heroin-possessing population, *Leary* holds that the presumption "cannot be upheld without making serious incisions into the teachings of *Tot*, *Gainey* and *Romano*" 395 U.S. at 52. Nor, consequently, can this court "escape the duty of setting aside petitioner's conviction" 395 U.S. at 53, in this case as in *Leary*.

B. The Statutory Presumption Violates the Fifth Amendment Privilege Against Self-Incrimination.

Petitioner Turner offered no evidence (Tr. 15-16, *supra*), as prescribed in *Yee Hem* to "rebut . . . the natural inference of unlawful importation, or [his] knowledge of it." 268 U.S. at 184. The result was predictable conviction since possession was not explained to the "satisfaction" of the jury and the jury was instructed that it may convict on possession and nothing more. (Tr. 15-16, *supra*) That result, which penalizes the silence of the defendant, violates the constitutional protection against self-incrimination both with respect to this charge against him[6] and any other charge which might have been brought upon the basis of the acknowledgment of possession which he would have had to make to rebut the inferences of knowledge and unlawful importation.

With respect to the operation of the presumption to incriminate the petitioner in this case, Mr. Justice Black

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[6]The same issue—the jeopardy to the defendant's constitutional rights to remain silent in capital trials arising from the "single-verdict procedure", where a jury determines both guilt and sentence—is currently presented for determination by the Supreme Court in the "capital punishment case" *Maxwell v. Bishop*, No. 13, Oct. Term 1969.

denounced similar inferences of ownership and proprietorship from mere presence at a still, in *Gainey*, *supra*. He said, in terms directly applicable here,

> "These statutory presumptions must tend, when incorporated into an instruction, as they were here, to influence the jury to reach an inference which the trier of fact might not otherwise have thought justified, to push some jurors to convict who might not otherwise have done so. *Cf.* Pollock v. Williams, 332 U.S. 4, 15, 88 L.ed. 1095, 1102, 64 S.Ct. 792. The undoubted practical effect of letting guilt rest on unexplained presence alone is to force a defendant to come forward and testify, however much he may think doing so may jeopardize his chances of acquittal, since if he does not he almost certainly destroys those chances. This is compulsion, which I think runs counter to the Fifth Amendment's purpose to forbid convictions on compelled testimony. I am aware that this Court in *Yee Hem v. United States* . . . [*supra*] held that use of a presumptive squeeze like this one did not amount to a form of compulsion forbidden by the Fifth Amendment. The Court's reasoning was contained in a single paragraph, the central argument of which was that despite a presumption like this a defendant is left 'entirely free to testify or not as he chooses.' That argument, it seems to me, would also justify admitting in evidence a confession extorted by a policeman's pointing a gun at the head of an accused, on the theory that the man being threatened was entirely free to confess or not, as he chose. I think the holding in *Yee Hem* is completely out of harmony with the Fifth Amendment's prohibition against compulsory self-incrimination, and I would overrule it. . ." 380 U.S. at 87-88 (dissenting opinion).

Recognition by a majority of the court of the same principle has recently been strongly expressed in *Griffin v. California*, 380 U.S. 609 (1965), where comment by the prosecution on the defendant's silence was held violative of his self-incrimination protection, because the rule permitting

such comment "is a penalty imposed by courts for exercising a constitutional privilege," a penalty which "cuts down on the privilege by making its assertion costly." 380 U.S. at 614. Similarly, the Court voided the portion of the Federal Kidnapping Act, 18 U.S.C. § 1201a, providing the death penalty if the jury so recommended, in *United States v. Jackson*, 390 U.S. 570 (1968), which worked to discourage "assertion of the Fifth Amendment right not to plead guilty," and thereby to "chill the assertion of constitutional rights by penalizing those who choose to exercise them. . ." 390 U.S. at 581.

The privilege against compulsory self-incrimination is "as broad as the mischief against which it seeks to guard." *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892), and ". . . the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will." *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); *Miranda v. Arizona*, 384 U.S. 436 (1966). By these standards, the instant presumption ineluctably works to penalize the defendant for his silence. Moreover, the attempt at even-handedness shown by the trial judge in instructing the jury that the statutory presumption does not shift the burdens of proof (Tr. 16) is no less "subtly compelling" judicial condemnation when coupled with an awesome instruction that "some particular factual inference has been enshrined in an Act of Congress," as Mr. Justice Douglas indicated in his dissent in *Gainey*, 380 U.S. at 72-73. Under such a charge, Mr. Justice Black pointed out, "Few jurors could have failed to believe it was their duty to convict. . ." *Id.* at 77. In principle and in practical effect, the "presumptive squeeze" of the statute violated the petitioner's Fifth Amendment right to be free from self-incrimination.

Moreover, it should also be pointed out that the reach of testimonial compulsion goes beyond potential conviction in this case, to prosecution for failure to register and pay the Federal occupational tax required of all possessors of narcotic drugs, 26 U.S.C. §§ 4724a, c, and possession itself under

local law, *e.g.*, 24 N.J.S.A. § 18-4. For petitioner Turner to overcome the presumption in a prosecution under 21 U.S.C. § 174 with respect to unlawful importation and knowledge thereof, he must acknowledge possession of a narcotic drug. Even if successful in the Federal prosecution, he would thereafter be subject to re-charging on the basis of the admissions of possession there made, and acquittal would not protect him from double jeopardy. See, *e.g.*, *Bartkus v. Illinois*, 359 U.S. 121 (1959). Thus the constituional privilege would be further violated.

C. The Statutory Presumption Operates To Deprive the Defendant of Trial by Jury.

In his dissent in *Gainey*, Mr. Justice Black found that the use of statutory presumptions

> "seriously impaired Gainey's constitutional right to have a jury weigh the facts of his case without any congressional interference through predetermination of what evidence would be sufficient to prove the facts necessary to convict in a particular case." 380 U.S. at 81.

Such interference, he found, violated the right to trial by jury guaranteed by Article III, § 2, and the Sixth Amendment of the Constitution, relying on *Bailey v. Alabama*, 219 U.S. 219 (1911), where a state statute was invalidated which provided that failure to provide services contracted and paid for or to refund money would be prima facie evidence of intent to defraud.

The same principle served as grounds for Justice Black's concurrence in *Leary* where he held that Congress cannot tell juries to convict on "any such forced and baseless inference" as the presumption there–and here–involved. 395 U.S. at 55.

Here the vice of depriving the accused of the right to have jury weigh the central elements of the charge brought against him should similarly defeat any conviction premised on inferences as "forced and baseless" as the inferences of

unlawful importation and knowledge thereof have been shown to be.[7]

II.

INDIVIDUALLY AND AS PART OF A BROAD STATUTORY SCHEME, 26 U.S.C. § 4704a COMPELS SELF-INCRIMINATION CONTRARY TO THE FIFTH AMENDMENT.

Both in terms of its operation at trial and as an integral part of a broad statutory narcotics control scheme, 26 U.S.C. § 4704a, as applied to this petitioner, violates the Fifth Amendment's protection against self-incrimination. As such, the conviction of the petitioner must be reversed.

A. Individually, Section 4704a Violates the Petitioner's Right To Remain Silent at the Trial.

The petitioner was prosecuted under 26 U.S.C. § 4704a for having purchased drugs not in or from their original stamped package, as to which mere possession of such drugs without the requisite tax stamps was the only indication of a statutory violation shown by the Government. 404 F.2d at 783. The case went to the jury solely on the statutory presumption of Section 4704a, which provides, as follows–

> ". . . the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

[7]The same consideration would also require upsetting Turner's conviction under 26 U.S.C. § 4704a where mere possession is said to be "prima facie" evidence of violation of the subsection. According to the Third Circuit, "The Government offered no evidence . . . that [Turner] did not purchase the drugs in or from their original stamped package." 404 F.2d at 783. In practical terms, therefore, the jury reached its result not on evidence, but on the statutory mandate, in violation of its responsibilities and Turner's rights under the Constitution.

In its practical effect, this presumption operates just as the presumption in 21 U.S.C. § 174, to confront the defendant at trial with the incriminatory dilemma of keeping silent with respect to any explanation he might offer as to how he came by drugs without tax stamps, and making such an explanation that would open up the prospect of further prosecution, under Federal law (*e.g.*, for failing to register and pay the occupational tax as required by 26 U.S.C. §§ 4722-4724) on a mere showing of possession, or under local law for possession itself (*e.g.*, 24 N.J.S.A. § 18-4).

United States v. Gainey, *supra*; *Griffin v. California*, *supra*; and *United States v. Jackson*, *supra*, all dictate, for the reasons set forth in Arg. IB, *supra*, that this further prosecutorial shortcut be condemned under the Fifth Amendment's protection against compulsory self-incrimination.

B. As Part of a Comprehensive Narcotics Control Scheme, 26 U.S.C. § 4704a Violates Petitioner Fifth Amendment Right To Be Free from Self-Incrimination.

The statutory section in question is part of a comprehensive regulatory scheme embodied in the Harrison Act, applying a regime of taxation and disclosure to every critical element in the chain of commerce in these commodities. The principal statutory controls in Title 26, are, in summary, the following:

1. **Commodity tax**–Section 4701a requires a tax to be paid on every narcotic drug, regardless of origin, by the importer, manufacturer, producer or compounder (Section 4701b), with certain exemptions (Section 4702). Evidence of payment of tax is to be in the form of stamps affixed to the container. (Section 4703) Section 4704a makes it unlawful to purchase, sell, dispense or distribute narcotic drugs without the stamps affixed.

2. **Registration and occupational tax**–Section 4721 imposes an annual occupational tax on "every person who imports, manufactures, produces, compounds, sells,

deals in, dispenses, or gives away "narcotic drugs, varying according to category of occupation. Section 4722 requires each person who engages in a business within the coverage of Section 4721 to register annually. Section 4723 bars possession of "any original stamped package containing narcotic drugs by any person who has not registered and paid" the occupational tax. Section 4724 makes unlawful the carrying on of any occupation subject to the occupational tax without paying the tax and, *inter alia*, similarly bars possession by any person who has not registered and paid the occupational tax of any narcotic drug.

3. **Transaction controls**–Section 4705 makes it unlawful to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of a person to whom the Secretary of the Treasury has issued, in blank, an official order form. (Section 4704a) Each person who receives a form must preserve the form for inspection for a period of two years (Section 4704d). Forms shall be sold only to persons registered with the Secretary, whose names are to be entered on the form and recorded in the Secretary's records, and no one else may use such forms. (Section 4705f) Narcotics obtained by use of such forms may be used only in a lawful business or legitimate practice of a profession. (Section 4705g) Inspection of duplicate order forms, retained by the Secretary (Section 4704e) and order forms preserved by transferors is open to Federal and State law enforcement officials (Section 4773).

When seen in context of this overall statutory scheme, it is apparent that the vice of compulsory self-incrimination struck down by the Supreme Court in *Albertson v. SACB*, 382 U.S. 70 (1965), *Marchetti v. United States*, 390 U.S. 39 (1968), *Grosso v. United States*, 390 U.S. 62 (1968), *Haynes v. United States*, 390 U.S. 85 (1968), and *Leary*, 395 U.S. at 12-27, are fully present in the application of 26 U.S.C. § 4704a to the petitioner.

For it is clear that th[e tax stamps are an essential aspect] of the registration and [occupational tax provisions of the] Harrison Act. If petiti[oner Turner himself had imported,] manufactured, produce[d, or compounded the heroin in his] possession, he would ha[ve had to identify himself to Federal] Revenue officials, for t[he purpose of paying the commodity] tax himself (Section 47[01b), and thus forced himself to reg]ister and pay the occ[upational tax pursuant to Sections] 4721 and 4722. Had h[e acquired the heroin from the com]modity taxpayer, the tr[ansfer could only have been lawfully] accomplished pursuant [to a written order form which the] petitioner would have [had to secure pursuant to Section] 4705a, a requirement b[roadly condemned in *Leary*, *supra*,] and which would mor[eover have made petitioner directly] liable to register and p[ay the occupational tax, 26 U.S.C.] § 4705b. Indeed, mere[possession of narcotics in stamped] packages would have be[en sufficient to invoke a requirement] pursuant to Section 47[23 that the petitioner pay the occu]pational tax and registe[r.

Section 4704a under [which petitioner was tried and con]victed is, hence, nothin[g more than a satellite device for the] registration and occupat[tional tax provisions. In the light of] petitioner's exposure to [prosecution for possession of a nar]cotic drug under appli[cable state law, 24 N.J.S.A. § 18-4,] petitioner's conviction [under 26 U.S.C. § 4704a is indistin]guishable from the cor[nviction in *Haynes v. United States*,] *supra*, where the Supre[eme Court invalidated a conviction] under the similarly int[errelated provisions of the National] Firearms Act. In *Hayn[es* the Court held that a statute that] makes unlawful posses[sion of an unregistered firearm, 26] U.S.C. § 5851, is not pr[operly distinguishable from a statute] which requires registra[tion of possession of a firearm, 26] U.S.C. § 5341, and that [the registration of possession would] expose the registrant to [prosecution under state law. 390] U.S. at 90-95.

Nor is the statutory e[ffort in *Haynes* to punish for failure] to register a contraband [commodity properly distinguishable] from the effort in *Turn[er* to punish the petitioner because

he has not publicized his possession of the contraband drug by payment of the commodity tax. Both statutes are an equally thin mask for a Federal individual registration provision, a provision that the Congressional sponsors of the Harrison Act conceived in 1913 as a device to meet the

> "real, even desperate, need of Federal legislation to control our foreign and interstate traffic in habit-forming drugs, and *to aid both directly and indirectly the States more effectually to enforce their police laws.*" H. Rep. 23, 63d Cong., 1st Sess., p. 1 (emphasis added).

Haynes dictates that any effort to effectuate this purpose by punishment for declining to incriminate oneself cannot be countenanced under the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the amicus curiae urges that the conviction of petitioner Turner be reversed.

Respectfully submitted,

Steven R. Rivkin

Counsel for Amicus Curiae, Cleveland Burgess
(Appointed by the United States Court of Appeals for the District of Columbia Circuit)

August 15, 1969

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Brief for the Amicus Curiae, Cleveland Burgess, have been served in hand this 15th day of August 1969 upon the Office of the Solicitor General, U. S. Department of Justice, and the United States Attorney for the District of Columbia, U. S. Courthouse, Washington, D. C., and by mail, postage prepaid, upon counsel for petitioner, Josiah E. DuBois, Jr., 511 Cooper Street, Camden, N. J. 08101.

Steven R. Rivkin

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 190

JAMES TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 25–29) is reported at 404 F. 2d 782.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1968 (A. 30). The petition for a writ of certiorari was filed on January 8, 1969, and was granted on June 2, 1969 (395 U.S. 933; A. 31). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, as here applied, the provision in 21 U.S.C. 174 that a defendant's possession of heroin is

sufficient evidence to authorize his conviction, unless the defendant explains his possession to the satisfaction of the jury, is valid under the Due Process and Self-Incrimination Clauses of the Fifth Amendment.

2. Whether the application in this case of the provision in 26 U.S.C. 4704(a) that the absence of appropriate taxpaid stamps from narcotic drugs shall be *prima facie* evidence of a violation by the person in possession of the drugs violated either the Due Process or Self-Incrimination Clause of the Fifth Amendment.

STATUTES INVOLVED

The Narcotic Drugs Import and Export Act of 1909, Sec. 2(c), as amended, 70 Stat. 570 (21 U.S.C. 174), provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The Internal Revenue Code of 1954, 26 U.S.C. 4704 (68A Stat. 550), provides:

§ 4704. Packages.

(a) General requirement.

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

(b) Exceptions in case of registered practitioners.

The provisions of subsection (a) shall not apply—

(1) Prescriptions.

To any person having in his or her possession any narcotic drugs or compounds of narcotic drug which have been obtained from a registered dealer in pursuance of a written or oral prescription referred to in section 4705(c)(2), issued for legitimate medical uses by a physician, dentist, veterinary surgeon, or other practitioner registered under section 4722; and where the bottle or other container in which such narcotic drug or compound of a narcotic drug may be put up by the dealer upon said

prescription bears the name and registry number of the druggist, and name and address of the patient, serial number of prescription, and name, address, and registry number of the person issuing said prescription; or

(2) Dispensations direct to patients.

To the dispensing, or administration, or giving away of narcotic drugs to a patient by a registered physician, dentist, veterinary surgeon, or other practitioner in the course of his professional practice, and where said drugs are dispensed or administered to the patient for legitimate medical purposes, and the record kept as required by this subpart of the drugs so dispensed, administered, distributed, or given away.

STATEMENT

After a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on all four counts of an indictment charging narcotics violations at the same location and on the same date (June 1, 1967). Count One charged that he knowingly received, concealed and facilitated the transportation of heroin after illegal importation into the United States, knowing that the heroin had been illegally imported, in violation of 21 U.S.C. 174. Count Two charged that he knowingly purchased, possessed and distributed the heroin not in or from the original stamped package, in violation of 26 U.S.C. 4704(a).[1] Count Three charged that he knowingly received, concealed and facilitated the transpor-

[1] This count, as well as Count Four, alleged that the acts were also in violation of 26 U.S.C. 4701, 4703 and 7237(a).

tation of cocaine hydrochloride after illegal importation into the United States, knowing that the cocaine had been illegally imported, in violation of 21 U.S.C. 174. Count Four charged that he knowingly purchased, possessed and distributed the cocaine not in or from the original stamped package, in violation of 26 U.S.C. 4704(a) (A. 7–8). On November 14, 1967, petitioner was sentenced to imprisonment for a total of twenty years—concurrent sentences of ten years on Count One and five years on Count Two to run consecutively with concurrent sentences of ten years on Count Three and five years on Count Four.[2]

1. The evidence adduced by the government showed that on June 1, 1967, federal narcotics agents arrested petitioner and two other individuals shortly after their automobile emerged from the Lincoln Tunnel in Weehawken, New Jersey, following a trip from New York City.[3] While the occupants of the vehicle were being searched, but before the actual personal search of petitioner had commenced, petitioner threw a tinfoil package containing cocaine to the top of a nearby wall. Thereafter, government agents found a tinfoil package containing heroin under the front seat of the vehicle (A. 16–17, 25–26; Tr. 57–58).[4] The package

[2] After verdict and before sentencing information as to a prior narcotics conviction had been filed (A. 2). See 26 U.S.C. 7237(c)(2); 21 U.S.C. 174.

[3] Prior to trial, the district judge denied a motion to suppress the evidence. The court found probable cause for the arrest and that the search of the persons and the vehicle were incidental to the arrest.

[4] The heroin was in a tinfoil package containing eleven bundles, and each bundle in turn contained 25 double glassine bags (a total of 275 double glassine bags) (Tr. 59–60, 20).

containing cocaine weighed 14.68 grams and was a mixture of cocaine hydrochloride and sugar, five percent of which was cocaine. The package containing heroin weighed 48.25 grams and was a mixture of heroin, cinchonal alkaloid, mannitol and sugar, 15.2 percent of which was heroin (Tr. 89, 43–44). None of the containers had any tax stamps affixed (Tr. 59, 62). The government offered no evidence as to the origin of the drugs; nor did it introduce any direct evidence that petitioner had purchased or sold the drugs. The vehicle, in which the heroin was found, was registered in petitioner's name. Petitioner did not testify or offer any evidence on his own behalf.

2. The court instructed the jury that they were "the sole and exclusive judges of the facts" (A 9); that the government had the burden of satisfying the jury that the defendant was guilty beyond a reasonable doubt; and that the defendant was presumed to be innocent (A. 12–13). The court then read to the jury Count One of the indictment and 21 U.S.C. 174, the statute under which that charge was brought, including the provision that possession is sufficient evidence "to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury" (A. 14–15). The court thereafter charged as follows (A. 15–16):

> Now, obviously there is no evidence in this case that this particular defendant knew that this cocaine and this heroin had been imported in the United States contrary to law. The statute recognizing the impossibility of proving

knowledge in these cases, and having in mind the welfare of the people which is the purpose of the Food and Drug Act, says that all you have to do, all the Government has to do is to show that there was possession of this drug by the defendant on trial and that evidence shall suffice to authorize conviction of violation of the statute, unless by the witnesses presented the possession of the drugs by this defendant under those circumstances was satisfactorily explained to the jury. I charge you that there is no such evidence as that called for by the portion of the section which I have just completed reading.

I believe in an overabundance of caution, in view of the reference made by counsel for the defendant in his summation, the burden of proof cast upon the Government to prove all of the essential elements of the offense charged here does not require that any evidence, even though there is this presumption clause of the statute to be presented by the defendant. In other words, you must be satisfied by the totality of the evidence irrespective of the source from which it comes of the guilt of the defendant of the offense proscribed by the section which I read to you in order to find the defendant guilty of a violation of that section.

After summarizing the evidence (A. 16–17), the court advised the jury that the violation charged in Count Three was similar to that in Count One except that the drug was different (A. 17–18). The court then said (A. 17–18):

* * * Therefore, if in the light of all the evidence as you find it to be, and the inferences

> which you have determined to draw therefrom, and under the language of the statute and the instructions of the Court you are convinced beyond a reasonable doubt that the defendant here was guilty of a violation of that section, you may return a verdict of guilty of the offense charged therein. On the other hand, unless you are so convinced unanimously beyond a reasonable doubt your verdict must be a verdict of not guilty in favor of the defendant.

The court then dealt with the two counts based on the original stamped package requirement and read to the jury the charge under these counts and the statute involved, 26 U.S.C. 4704(a), including its *prima facie* evidence provision (A. 18). The court continued (A. 18–19):

> Now, the testimony presented by the Government here is uncontradicted that none of the material which was seized by the Treasury agents was either in or appeared to be taken from a package bearing the stamps required by the Internal Revenue laws. That requirement is in the preceding section to that which I read you, which requires that the stamps required by a later section for narcotic drugs shall be so affixed to the bottle or other container as to securely seal the stopper covering or wrapper thereof and the later section, which deals directly with narcotic drugs as the subject of excise taxes requires that the stamps imposed by two other sections of the same Title shall be obtained or provided by the Secretary of the Treasury or his delegate and shall be applicable to narcotic drugs * * *. I don't think

> you are going to have any difficulty with counts two and four * * * because they charge violations of the Internal Revenue laws and the evidence in this case stands uncontradicted that the substances which were received by the Treasury agents in this case were not from the original stamped package and the packages thereof so seized bore no stamps as required by the statute.
>
> So that in effect your problem, your principal problem here will be to determine whether or not certain quantities of heroin hydrochloride and cocaine hydrochloride which have been marked in evidence in this case were in the possession or under the control or both of the defendant in this case, James Turner, on June 1, 1967 when they were seized by the United States Treasury agents in Weehawken in the District of New Jersey.

Petitioner did not object to the instructions concerning the statutory presumptions contained in 21 U.S.C. 174 and 26 U.S.C. 4704(a) (A. 22); nor did he in any other way question the constitutionality of these provisions at the trial.

SUMMARY OF ARGUMENT

I

1. The statutory inference, applicable to Count One, that petitioner's heroin had been illegally imported is rational. All heroin in the United States is smuggled here from abroad. In contrast to marijuana, which was involved in *Leary* v. *United States,* 395 U.S. 6, there is no substantial likelihood that any heroin is

produced domestically. The opium poppy from which raw opium is processed is not grown in the United States, and it is unlawful to import opium products for the purpose of producing heroin. No clandestine laboratory engaged in the production of heroin from stolen opium or morphine has been discovered in recent years; and, even if it were assumed that the entire quantity of these drugs stolen in numerous separate thefts were aggregated into such laboratory operations, the amount of heroin so produced would be less than one percent of that illegally imported. Since the presumption that heroin is illegally imported thus mirrors reality, it was proper for Congress to permit juries so to conclude without the necessity of repetitive proof of this fact in every case.

Since all heroin is illegally imported, it is also proper for the statute to permit a jury to infer that a person possessing it would be aware of its foreign origin. This statutory inference merely follows recognized principles of criminal law by according to the evidence, if unexplained, "its natural probative force." It is as rational to infer knowledge of illegal importation from possession of heroin as it is, for example, to infer knowledge of theft from possession of recently stolen property. The jury could, therefore, properly infer from petitioner's possession of two hundred seventy-five bags of heroin that he was aware that it had been illegally imported.

2. Petitioner's conviction under Count Three should not be sustained because the statutory presumption that he knew that the small amount of cocaine in his

possession had been illegally imported lacks adequate rational foundation. Unlike heroin, cocaine is legally manufactured and distributed in the United States, and substantial quantities of it are stolen from legitimate sources. It is as rational to assume that petitioner believed that his cocaine had been obtained in such a theft as it is to assume that he believed that it had been illegally imported. Accordingly, we concede that partitioner's conviction should be reversed as to Count Three.

II

The statutory presumption, applicable to Counts Two and Four, that the possession of narcotic drugs without taxpaid stamps "shall be prima facie evidence" that the possessor purchased the drug from an unstamped package was rationally applied in this case. Since there are no stamped packages of heroin from which unstamped heroin can be acquired, the inference of guilt as to this drug flows naturally from its possession. The inference was also rationally applied to petitioner's possession of the cocaine, since it was in a non-medicinal mixture that is not found in stamped packages, and since other circumstances in the case suggest that petitioner had purchased narcotics in the illicit trade.

III

1. So long as it is rational to infer the presumed fact from the proved fact, the inference does not impermissibly compel the defendant to testify and, there-

fore, does not abridge his privilege against self-incrimination. When a defendant is motivated to testify by the strength of the lawful evidence adduced against him, including the inferences rationally deduced therefrom, his right to remain silent has not thereby been impermissibly impaired. The situation is no different in principle whether it is a statute, or a judicially created rule, which provides that a particular rational inference may be derived from the evidence. In both circumstances, the constraint to testify arises from the facts in evidence and not from any unconstitutional compulsion.

Nor is the privilege against self-incrimination violated because petitioner, if he had testified, might have incriminated himself under other laws. This is one of a variety of risks to which an accused inevitably exposes himself when he testifies, but such risks do not invalidate the statute under which he is charged.

2. The trial court's instructions concerning the statutory presumptions did not constitute an adverse comment on petitioner's failure to testify. As in *United States* v. *Gainey*, 380 U.S. 63, the jury was merely permitted to draw rational inferences from the unexplained circumstantial evidence presented by the government. The jury was also admonished that the burden of proving guilt beyond a reasonable doubt was on the government, notwithstanding the statutory presumptions.

ARGUMENT

This case involves challenges to the constitutional validity of two statutory presumptions relating to

"hard" narcotics. The first, in 21 U.S.C. 174, which prohibits the possession of such drugs by one who knows that they were unlawfully imported, provides that at a trial proof of possession of the narcotic drug by the defendant "shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." The second, in 26 U.S.C. 4704(a), which makes it unlawful to purchase or sell drugs except in the original stamped package, provides that the absence of appropriate tax stamps from narcotic drugs "shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."[5] The constitutionality of each of these presumptions has previously been upheld by this Court: that of Section 174 in *Yee Hem* v. *United States,* 268 U.S. 178, and that of Section 4704(a) in *Casey* v. *United States,* 276 U.S. 413. The grant of certiorari in the present case, therefore, calls for a reexamination of the continuing validity of these decisions. It is the government's position that this reexamination should lead to a reaffirmation of *Yee Hem* and *Casey* regarding the validity of these presumptions.[6]

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[5] Section 4704(a) does not apply to any person possessing narcotic drugs under a prescription issued by a physician or other registered practitioner where the container holding the drugs has the requisite information concerning the druggist and the person issuing the prescription, or, if directly dispensed by an authorized practitioner, where required records are kept as to such dispensation.

[6] We concede, however, under Count Three that petitioner's conviction should be reversed because it was improper to apply the Section 174 presumption to his possession of cocaine in the circumstances of this case (see *infra*, pp. 28–32).

We first urge that, unlike the presumption of knowledge as to source with regard to marijuana which this Court held invalid in *Leary* v. *United States,* 395 U.S. 6, the application of the Section 174 presumption to heroin rests upon a solid rational foundation and therefore satisfies due process requirements. We next show that the applications herein of the presumption contained in 26 U.S.C. 4704(a) were also founded in reason. We then contend that, given the rationality of the inferences these statutes permit, petitioner's self-incrimination arguments should not be sustained.

I

THE TRIAL COURT'S CHARGE UNDER 21 U.S.C. 174 THAT THE JURY WAS ENTITLED TO CONVICT UPON A FINDING OF UNEXPLAINED POSSESSION OF THE HEROIN DID NOT VIOLATE THE REQUIREMENTS OF DUE PROCESS

A. IT WAS RATIONAL FOR THE JURY TO CONCLUDE FROM PETITIONER'S POSSESSION OF THE TWO HUNDRED SEVENTY-FIVE BAGS OF HEROIN THAT THE HEROIN WAS ILLEGALLY IMPORTED INTO THE UNITED STATES AND THAT PETITIONER HAD KNOWLEDGE OF ITS ILLEGAL IMPORTATION

In *Leary* v. *United States,* 395 U.S. 6, 32–36, this Court reaffirmed that, as previously stated in *Tot* v. *United States,* 319 U.S. 463, *United States* v. *Gainey,* 380 U.S. 63, and *United States* v. *Romano,* 382 U.S. 136, the "rational connection" test is the controlling standard for determining the constitutional validity of a criminal statutory presumption. The formulation of the test in *Tot* v. *United States, supra,* 319 U.S. at 467–468, was that "* * * a statutory presumption cannot be sustained if there be no rational connection between

the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." In *Gainey, supra,* 380 U.S. at 67, the Court explained how the question of rationality was to be resolved:

> The process of making the determination of rationality is, by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it.

And in *Leary,* the rationality standard was restated as follows (395 U.S. at 36):

> * * * [A] criminal statutory presumption must be regarded as "irrational" or "arbitrary" and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. * * *

Under this standard, the statutory presumption involved in *Leary* was held invalid. That presumption was contained in 21 U.S.C. 176a, dealing with marihuana. The marihuana statute, like Section 174, authorized the jury to infer from the defendant's possession of that particular drug two necessary elements of the crime: (1) that the drug was imported into the United States illegally, and (2) that the defendant knew of the unlawful importation of the drug. Based upon its analysis of "the available, pertinent data" (395 U.S. at 38), the Court in *Leary*

found that "a significant percentage of domestically consumed marihuana may not have been imported at all," but may have been grown in this country (395 U.S. at 46; see *id.* at 39–43). In these circumstances, the Court held that "to sustain the inference of knowledge we must find on the basis of the available materials that a majority of marihuana possessors either are cognizant of the apparently high rate of importation or otherwise have become aware that *their* marihuana was grown abroad" (395 U.S. at 46–47; emphasis in original). Upon an examination of such data, the Court concluded that there was insufficient support for an inference that the marihuana consumer knew that this drug came from abroad.[7]

The Court significantly pointed out in *Leary,* however, that "if it were proved that little or no marihuana is grown in this country," the inference that the user knew that his marihuana was imported "might be thought justified by common sense" (395 U.S. at 46). We submit that such a "common sense" conclusion as to knowledge by the possessor of heroin is justified. For, as we will demonstrate, heroin is not produced in or legally imported into the United States. It is thus entirely rational, indeed inescapable, to infer that a substantial amount of heroin hidden under the seat of an automobile (as in this case) was illegally imported, and it is also rational to infer

[7] Accordingly, the Court found it unnecessary to decide whether the presumption that the marihuana was illegally imported was valid.

as a matter of "common sense" that the possessor of that heroin knew[8] of its illegal importation.

1. Heroin is neither produced in nor legally imported into the United States

In prosecutions under 21 U.S.C. 174, Congress has authorized the jury to infer from the defendant's possession of narcotic drugs that the drugs were imported into the United States illegally.[9] Congress thus excused the government from having to establish this element of the crime in every case by formally proving that such drugs have an illegal foreign origin. As applied to heroin, this approach is constitutionally permissible because this drug is neither produced in nor legally imported into the United States. Indeed, the fact of illegal foreign origin is for practical purposes almost irrefutable.

Heroin is an opium derivative, resembling morphine from which it is prepared. At one time it was considered useful for medicinal purposes, but it no longer is used in medical practice in the United States.[10] See

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[8] The definition of "knowledge" adopted by this Court in *Leary* is, we believe, equally applicable here—*i.e.*, knowledge of a fact "is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist." 395 U.S. at 46 n. 93.

[9] 21 U.S.C. 176b, which makes it a crime knowingly to give or sell unlawfully imported heroin to any person under the age of eighteen years, also provides that possession shall be sufficient proof that the heroin was unlawfully imported unless the defendant explains his possession to the satisfaction of the jury.

[10] Small quantities of heroin are used in the United States in scientific experimentation (see, *e.g.*, authorities cited in note 16, *infra*). We are informed by the Bureau of Narcotics and Dangerous Drugs that heroin used for this purpose is supplied entirely from quantities seized by law enforcement officials.

S. Rep. No. 1997, 84th Cong., 2d Sess. p. 7 (1956). Beginning in 1909 with the narcotic drug import statute presently before the Court,[11] Congress has enacted a series of laws "all to the end of dealing more and more strictly with, and seeking to throttle more and more by different legal devices, the traffic in narcotics." *Gore* v. *United States,* 357 U.S. 386, 391. Since the 1909 enactment, it has been unlawful to import opium except for medicinal purposes. Act of February 9, 1909, Section 2, 35 Stat. 614 (21 U.S.C. 173). And for more than forty-five years, it has been unlawful to import opium for the purpose of manufacturing heroin. Act of June 7, 1924, 43 Stat. 657 (21 U.S.C. 173). Finally, in 1956, all heroin then lawfully outstanding was required to be surrendered. Act of July 18, 1956, 70 Stat. 572 (18 U.S.C. 1402). See *Hernandez* v. *United States,* 300 F. 2d 114, 118, n. 11 (C.A. 9).[12]

Nor is there a substantial likelihood that any heroin is produced domestically. While there is a theoretical possibility of such production in a clandestine laboratory in the United States, the director of the Bureau of Narcotics and Dangerous Drugs has recently stated

[11] The statutory inference is modeled after 18 U.S.C. 545 (1958 ed.), originally Section 4 of the Smuggling Act of 1866, 14 Stat. 178, 179. See H. Rep. No. 2003, 60th Cong., 2d Sess. (1909).

[12] In 1960, Congress provided that the Secretary of the Treasury could authorize the importation of "any narcotic drug" for delivery to governmental officials or to any person licensed to use the drugs for scientific purposes." Act of April 22, 1960, Section 16, 74 Stat. 67 (21 U.S.C. 513). We are informed by the Bureau of Narcotics and Dangerous Drugs, however, that the Secretary of the Treasury has never in fact permitted any importation of heroin under this statute. See *supra*, n. 10.

that "[h]eroin is not produced in the United States and we have not found a single clandestine laboratory for many years * * *." [13] Even if there were such a laboratory, it would require a supply of raw opium or morphine, which probably would have been illegally smuggled into the United States for this purpose. The quantities of legally imported opium and morphine that are stolen in this country [14] would seem to suggest that it is unlikely that such thefts are being employed to sustain commercial clandestine heroin laboratory operations [15]—especially in light of the

[13] Commission on Narcotic Drugs, 23d Sess. (Geneva, January 13–31, 1969), Statement by the United States Delegation on the Illicit Traffic, SD/E/CN.7/131 Annex A, p. 3. In *United States* v. *Haden*, 397 F. 2d 460 (C.A. 7), the defendant took preliminary steps to produce heroin, but his operation was stifled before any heroin was actually produced.

[14] A tabular report of such thefts for the ten calendar years 1959–1968 has been compiled from the records of the Bureau of Narcotics and Dangerous Drugs and is reproduced as an appendix to this brief (*infra*, p. 44). The Bureau informs us that, of the drugs there listed, only opium and morphine could be converted into heroin because none of the other drugs include morphine alkaloid—the base from which heroin is derived.

[15] The Bureau of Narcotics and Dangerous Drugs informs us that the largest total quantity of opium stolen annually in the past ten years (12.9 kilograms in 1965) would yield no more than 1 kilogram of heroin, and the largest total quantity of morphine (10.2 kilograms in 1965) would yield approximately 10.2 kilograms of heroin. Because of the large number of individual thefts involved (see Appendix, *infra*, p. 44), however, it cannot reasonably be believed that all the opium and morphine stolen throughout the United States in a given year was channeled into a single clandestine laboratory for conversion into heroin. In 1968, for example, the largest single theft of opium was of 226.4 grams from the Hawley Pharmacy in Millers Falls, Massachusetts, and the largest single theft of morphine was of 149.1 grams from the Walgreen Drug Company in Louisville, Kentucky.

fact that the stolen morphine (which is more easily converted into heroin and produces a greater yield thereof) can be consumed by heroin addicts without conversion in satisfaction of their needs [16] and may well be preferred to heroin by consumers because there is greater assurance as to the potency and uniformity of the product. In any event, even if it were to be assumed (however unrealistically) that all of the legally imported opium and morphine stolen in this country in numerous individual thefts each year is in fact converted into heroin, the quantity of heroin so produced in any year (see *supra*, n. 15) would be an insignificant fraction of the total supply [17]—less than

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[16] See Lasagna, *Addicting Drugs and Medical Practice*, in Wilner and Kassebaum (eds.), *Narcotics* (1965), pp. 53, 58; Martin and Fraser, *A Comparative Study of Physiological and Subjective Effects of Heroin and Morphine Administered Intravenously in Postaddicts*, 133 Journal of Pharmacology & Experimental Therapy 388; Smith and Beecher, *Subjective Effects of Heroin and Morphine in Normal Subjects*, 136 Journal of Pharmacology & Experimental Therapy 47.

[17] *Amicus* Burgess suggests that there may also be domestic synthesis of heroin (*Amicus* Br. p. 11). The only authority he cites, however, is a case (*United States* v. *Liss*, 137 F. 2d 995, 997 (C.A. 2), certiorari denied, 320 U.S. 773) in which efforts to reconstitute opium from its derivative drugs and also to synthesize morphine from non-opium products were unsuccessful. We are informed by the Bureau of Narcotics and Dangerous Drugs that synthetic heroin has never, to its knowledge, been produced, and that experimental production of synthetic morphine indicates that it would be extremely arduous to do so. In any event, the Bureau informs us that synthetic heroin would be chemically distinguishable from opium-derived heroin because the latter always contains at least a trace of narcine (a natural opium alkaloid). In the present case, of course, petitioner did not claim that the heroin found in his possession and chemically identified as such was not genuine, opium-derived heroin.

one percent of the estimated 1,500 kilograms of heroin smuggled into the United States annually.[18]

In contrast to marihuana, there is no domestic supply of raw opium or of the opium poppy from which raw opium is processed. In *Leary* v. *United States, supra,* 395 U.S. at 39–40, this Court noted the testimony of the former Commissioner of Narcotics before a congressional committee that there is a "considerable volunteer growth" of marijuana in the Middle West, and other testimony that marijuana was grown in Texas. At the same hearing, however, the then Commissioner stated that heroin comes "from opium that is smuggled out of Turkey, Iran, India, and Yugoslavia. It is made into heroin in clandestine laboratories and smuggled into this country." [19] There was no intimation in his testimony that the opium poppy, the cultivation of which is prohibited by federal statute,[20] was being produced in the United States. Indeed, it has been unequivocally stated that the United States is not an opium producing country. The President's Com-

[18] See The President's Commission on Law Enforcement & Administration of Justice, Task Force Report: *Narcotics and Drug Abuse*, p. 6; U.N. Commission on Narcotic Drugs, Report of the Eighteenth Session, E/3775/E/CN.7/455, p. 15 (1963); Louria, *Major Medical Complications of Heroin Addiction*, 67 Annals of Internal Medicine, p. 1.

[19] Hearings on Illicit Narcotics Traffic before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955) (parts), p. 31. Some heroin is also produced in Mexico. Hearings before a Special Subcommittee of the Senate Committee on the Judiciary pursuant to S. Res. 199 on S. 2113, etc., 89th Cong., 2d Sess., pp. 446–447 (1966).

[20] See *infra*, n. 26.

mission on Law Enforcement and Administration of Justice, Task Force Report: *Narcotics and Drug Abuse,* Appendix A–2, p. 40. While it is biologically possible to grow the opium poppy in this country, it is a "very delicate plant and requires extreme care in its cultivation." [21] Moreover "[t]he harvesting of opium is a laborious and time consuming process, and is only possible in countries with an adequate supply of cheap laborers." [22] The poppies have "an astonishing range of colours," [23] so that any substantial growth could hardly be kept secret for very long. From a practical viewpoint, therefore, undetected cultivation of the poppy in this country in quantities adequate for substantial commercial use would seem to be beyond the range of possibility. See *Az Din* v. *United States,* 232 F. 2d 283 (C.A. 9), certiorari denied, 352 U.S. 827. Indeed, if one considers further the paucity of prosecutions for such growth and the absence of any other evidence that there is growth of the poppy in this country—*e.g.,* reports of the destruction of acres of domestic poppy [24]—the conclusion seems inescapable that ex-

[21] Ramanathan, *The Opium Poppy, Its Cultivation and Harvesting,* U.N. Doc. GEN/NAR/67/CONF. 2/5 at p. 3 (1967).

[22] U.N. Regional Consultative Group on Opium Problems, *The Opium Poppy and Its Alkaloids,* U.N. Doc. GEN/NAR/67/CONF. 2/4 at p. 7 (1967). See, also, Kusevic, *Cultivation of the opium poppy and opium production* in Yugoslavia. 12 U.N. Bulletin on Narcotics, No. 2, April-June 1960, p. 5. The Opium Poppy, U.N. Doc. GEN/NAR/67/CONF. 2/5.

[23] *The Opium Poppy,* U.N. Doc. GEN/NAR. 67/CONF. 2/5 p. 2. See, also, *The Opium Poppy and Other Poppies,* U.S. Treasury Department, Bureau of Narcotics (1944).

[24] Contrast *Leary* v. *United States, supra,* in which the empirical evidence suggested a substantial amount of domestically producted marijuana which was thus destroyed.

tremely little, if any, opium poppy is being cultivated in this country.[25]

In sum, the only realistic conclusion is that the heroin which is trafficked in the United States has been smuggled from abroad after it has been converted from morphine at overseas clandestine chemical laboratories. The President's Commission on Law Enforcement and Administration of Justice stated, in its Task Force Report: *Narcotics and Drug Abuse* (1967), p. 3 (footnote omitted):

> Heroin occupies a special place in the narcotics laws. It is an illegal drug in the sense that it may not be lawfully imported or manufactured under any circumstances, and it is not available for use in medical practice. All the heroin that reaches the American user is smuggled into the country from abroad, the Middle East being the reputed primary point of origin. All heroin transactions, and any possession of heroin, are therefore criminal. * * *

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[25] During World War II, there was an effort to promote domestic growth of the opium poppy because of the rise of the price of the poppy seed for baking purposes. H. Rep. No. 2528, 77th Cong., 2d Sess. p. 2 (1942). As a result Congress passed the Opium Poppy Control Act of 1942, which prohibits the production of the opium poppy by any person not licensed under the Act to do so. 56 Stat. 1045 (21 U.S.C. 188). The Bureau of Narcotics has informed us, however, that the Secretary of the Treasury has not issued any licenses to produce opium under this Act and that only a small amount of opium for scientific purposes is legally being cultivated in the United States. See, generally, *The Supression of Poppy Cultivation in the United States*, 2 U.N. Bulletin on Narcotics No. 3, p. 9. See, also Maurer and Vogel, *Narcotics and Narcotic Addiction* (2d ed. 1962) p. 212; *Stutz* v. *Bureau of Narcotics*, 56 F. Supp. 810 (N.D. Cal).

In the present case, in which a substantial amount of heroin was found hidden under the seat of an automobile, it thus may be concluded "with substantial assurance that the presumed fact [illegal importation] is more likely than not to flow from the proved fact [possession] on which it is made to depend." *Leary, supra,* 395 U.S. at 36.

Indeed, since there is no real possibility of the existence of domestically produced heroin, the presumption that the heroin came from abroad has rarely been contested until recently.

In *Yee Hem* v. *United States,* 268 U.S. 178, 184, this Court, in upholding this very presumption in 1925, said: "We think it is not an illogical inference that opium, found in this country more than four years (in the present case, more than fourteen years) after its importation had been prohibited, was unlawfully imported." The additional passage of time and the subsequent history of heroin legislation which we have detailed [26] serve only to strengthen the presumption. [27]

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[26] One of the purposes of requiring the surrender of all theretofore lawfully possessed heroin in 1956 was to strengthen the statutory presumption. S. Rep. No. 1997, 84th Cong., 2d Sess. p. 7.

[27] Indeed, had Congress not left it to the jury to decide whether or not to draw the inference, we believe that the conclusion that heroin is unlawfully imported could properly be reached by judicial notice. As Professor McCormick has stated, such "judicial notice is not merely a substitute for formal proof by witnesses but is itself another method of proof of certain kinds of facts, namely, the method of research into the professionally authoritative books and reports in the particular field." McCormick, *Evidence* (1954), p. 712.

It would not benefit a defendant on the issue of his guilt or innocence to require the government in every case to call expert witnesses to prove the obvious—that heroin is illegally imported. To be sure, if formal proof were offered or required, a jury could disregard the government's evidence showing illegal importation. But, by the same token, a jury could also decide not to draw the inference authorized by the statutory provision. Since the presumption closely mirrors actuality, it was proper for Congress to relieve the courts and the government of the useless burden of proving the obvious in every case.

2. Since all heroin is illegally imported, it is rational to permit a jury to infer that a person in possession of two hundred seventy-five bags of heroin knows that it was illegally imported.

In addition to authorizing the jury to conclude that heroin in a defendant's possession was illegally imported, 21 U.S.C. 174 permits the jury to infer further that the possessor knows that it was illegally imported. Under the statute, the government thus makes a submissible case by proving possession. *Harris* v. *United States,* 359 U.S. 19, 23; see also *Roviaro* v. *United States,* 353 U.S. 53, 63.

We submit that the inference of knowledge is supported by the "intermediate step" found lacking in *Leary*. Unlike the situation with regard to marijuana, there is extremely little or no domestically produced heroin. Accordingly, just as a dealer in Rolls Royce automobiles or French perfumes could reasonably be charged with awareness of the foreign origin of the product, so it is a "common sense" conclusion

that "most [heroin] possessors are aware of the level of importation and have deduced that their own [heroin] was [made] abroad." *Leary* v. *United States, supra,* 395 U.S. at 46. Indeed, the fact that heroin comes from abroad illegally has received such widespread notoriety in the news media—both on television and in the press—that any person of ordinary intelligence, whether he deals in heroin or not, could fairly be charged with knowledge that it derived from a foreign source.

By permitting a jury to infer knowledge from possession of the heroin, Congress has merely applied recognized principles of criminal law. As long ago as 1896, this Court dealt with a similar problem in *Wilson* v. *United States,* 162 U.S. 613, 619. It was there held that "[p]ossession of the fruits of crime, recently after its commission, justifies the inference that the possession is guilty possession, and, though only *prima facie* evidence of guilt, may be of controlling weight unless explained by the circumstances, or accounted for in some way consistent with innocence." More recently, this ruling was followed in *Rugendorf* v. *United States,* 376 U.S. 528, 536–537. Again, where it is proved that the accused has in his possession a vehicle recently stolen in another state, the jury is permitted to draw the inference not only that the accused knew the vehicle was stolen but that he transported it in interstate commerce. See, *e.g., Beufve* v. *United States,* 374 F. 2d 123, 125 (C.A. 5); *Williams* v. *United States,* 371 F. 2d 141, 144 (C.A. 10). In other circumstances, a jury has been allowed

to infer that a defendant had "common knowledge" of customary bank practices. See *Pereira* v. *United States,* 347 U.S. 1, 9. In all these situations there is a "rational connection between the fact proved and the ultimate fact presumed." *Tot* v. *United States, supra,* 319 U.S. at 467. In other words, just as the inferences permitted in the above illustrations are grounded in the lessons of common experience, so the inference of knowledge with regard to heroin authorized by Congress does "no more than 'accord to the evidence, if unexplained, its natural probative force.' " *United States* v. *Gainey, supra,* 380 U.S. at 71. After all, in our accusatorial system of criminal justice, which honors a privilege against self-incrimination, knowledge, when it is an element of a criminal offense, can seldom be established by direct proof and ordinarily is inferred by the jury from the conduct of the accused and the circumstances of the case. To the extent that this places upon a defendant the burden of coming forward and explaining his conduct and the circumstances (see *Roviaro* v. *United States, supra,* 353 U.S. at 63; *Casey* v. *United States,* 276 U.S. 413, 418), the burden does not stem from notions of "comparative convenience" (compare *Leary* v. *United States, supra,* 395 U.S. at 45); it is the inevitable consequence of the sufficiency of the government's evidence, of the manifest logic, in the present case, of inferring knowledge from the fact of possession.

The facts of this case demonstrate that it was eminently fair to permit the jury to infer that petitioner knew that the heroin was illegally imported. He was found in possession of two hundred seventy-five bags

of heroin—a quantity strongly suggesting that he was not a mere consumer, but was trafficking in the illicit narcotics trade. The heroin was hidden under the front seat of petitioner's automobile, and shortly after his arrest he threw a package containing cocaine to the top of a nearby wall. A jury with its "special aptitude for reflecting the view of the average person" [28] could, in these circumstances, properly infer that petitioner, as a possessor of a large quantity of heroin, "knew" (see *supra*, n. 25) that the heroin (like virtually all heroin in the United States) was illegally imported.

B. PETITIONER'S CONVICTION ON COUNT THREE, BASED UPON HIS POSSESSION OF A SMALL AMOUNT OF COCAINE HYDROCHLORIDE, SHOULD BE REVERSED BECAUSE IT CANNOT FAIRLY BE SUSTAINED UNDER THE RATIONAL CONNECTION TEST

Under Count Three, petitioner was convicted of violating the import statute, 21 U.S.C. 174, after the government proved that he had possession of a package weighing 14.68 grams [29] containing a mixture of cocaine hydrochloride and sugar, five percent of which was cocaine. The statutory presumption of knowledge of illegal importation does not, however, have the same solid factual foundation with respect to small amounts of cocaine that it has with respect to heroin.

Cocaine, a drug derived from the leaves of the coca plant which is cultivated extensively in parts of South America, is used legitimately as a local anesthetic. "Legitimately, cocaine is sold as cocaine hydrochlo-

[28] *Kingsley Books, Inc.* v. *Brown*, 354 U.S. 436, 448 (dissenting opinion).

[29] A gram is about 1/28 of an ounce.

ride in powder form, in solution for injection, or in tablet form for the preparation of solutions. In contraband channels it is sold as the more or less pure powder and in such channels it has appeared in increasing quantity recently from South American sources. For sale to the ultimate addict-consumer, it is frequently sold in small papers of powder, cellophane packets, or gelatin capsules, containing about 1 grain." Maurer and Vogel, *Narcotics and Narcotic Addiction,* 2d ed. (1962) p. 115.

In *Erwing* v. *United States,* 323 F. 2d 674 (C.A. 9), the defendant had been convicted under Section 174 of receiving 9 grams and 300 milligrams of almost pure cocaine. At his trial, the record showed that cocaine hydrochloride was legally manufactured in this country for medical purposes; that a hospital would not be likely to have on hand more than three or four ounces, which it would keep under lock and key; that the ordinary drug store would carry in stock about one ounce; and that a lay person legitimately possessing cocaine hydrochloride would ordinarily have it in a dilute solution. The court of appeals, noting that the record further showed that cocaine hydrochloride was legally manufactured in this country by at least three major pharmaceutical manufacturers and that there was no evidence that this manufactured substance was imported into the United States either legally or illegally, held that there was no rational basis for inferring that the defendant knew the drug was illegally imported and, therefore, reversed the conviction. In three subsequent decisions, on the other

hand, the court of appeals for the Second Circuit upheld convictions under Section 174 based on possession of cocaine, finding in each case that the defendant had failed to establish by statistical or other proof that such application of the statutory presumption was irrational. *United States* v. *Coke,* 364 F. 2d 484 (C.A. 2), certiorari denied, 386 U.S. 918; *United States* v. *Reid,* 347 F. 2d 344 (C.A. 2); *United States* v. *Martinez,* 333 F. 2d 80 (C.A. 2), certiorari denied, 379 U.S. 907.

The above cases, as well as the instant case, were tried and decided upon appeal prior to this Court's decision in *Leary,* in which it was held that the application of a presumption would be unconstitutional "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U.S. at 36. In accord with that decision, we do not believe that petitioner's possession of the small amount of cocaine involved in this case—5 percent of a mixture of 14.68 grams, an amount which we assume is less than .75 grams of cocaine [30]—can be the basis for inferring "with substantial assurance" his knowledge of its illegal importation. It would be equally rational to assume that he believed that this small amount of cocaine was obtained as a result of theft from a legitimate source in this country. For, we are advised by the Bureau of Narcotics and Dangerous Drugs that large quantities of cocaine—hundreds of

[30] We have assumed that the sugar and the cocaine each had the same specific gravity.

kilograms annually—are legally manufactured and distributed in the United States primarily for medicinal purposes, and significant amounts thereof are introduced into the illicit traffic as a result of drug store burglaries and robberies. For example, the Bureau's records show that in 1967 (the year in which petitioner was arrested and tried) a total of 5,033 grams of cocaine were stolen in such thefts (see Appendix, *infra*, p. 44).[31]

This is not to say, however, that the presumptions contained in Section 174 may never be valid as to cocaine. Cases may arise in which the quantity of cocaine found in the defendant's possession is so large as to warrant an inference that he knew that the cocaine was illegally imported rather than obtained as a result of theft from a legitimate source. Or there may be other circumstances pointing to a foreign source. We believe, therefore, that the Court need not, and should not, now decide that the Section 174 presumptions can never appropriately be applied to possession of cocaine. We suggest only that in this case the presumption does not meet the requisite standard of

[31] The Bureau further advises us that its estimate (for comparison with the theft statistics in the Appendix, *infra*, p. 44) of the annual quantities of cocaine illegally imported is based on the following compilation of seizures at ports and borders. It estimates that these figures represent no more than approximately 10 percent of the total amount actually smuggled into the United States:

	Kilograms
1963	1.44
1964	17.71
1965	11.62
1966	2.53
1967	8.53

See Bureau of Narcotics Annual Reports, *e.g.*, 1967, p. 43.

rationality and that, accordingly, petitioner's conviction under Count Three of the indictment should be reversed.

II

AS APPLIED TO PETITIONER, THE STATUTORY PRESUMPTION CONTAINED IN 26 U.S.C. 4704(a) COMPLIED WITH THE REQUIREMENTS OF DUE PROCESS

As previously noted, petitioner was also convicted of having knowingly purchased, possessed, and distributed heroin (Count Two) and cocaine (Count Four) not in or from the original stamped package, in violation of 26 U.S.C. 4704(a). This statute provides that "the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." [32]

Since heroin is neither produced in nor legally imported into the United States (see *supra*, pp. 17–24), there would be no way to acquire it from a stamped package. Hence, as applied to heroin, the effect of this presumption is merely to state the obvious: that one in possession of unstamped heroin is in possession illegally, that is, that the heroin was not in a stamped package when he acquired it.

The application of this presumption to cocaine involves more complex considerations because, as we

[32] The statute was enacted in 1919 (40 Stat. 1130) to overcome the holding in *United States* v. *Jin Fuey Moy*, 241 U.S. 394, which construed the prohibition in the Harrison Act of 1914 of the possession of narcotics by "any person not registered" to be applicable only to a person in the class required to register. H. Rep. No. 767, 65th Cong., 2d Sess., p. 36 (1918).

have noted (*supra*, pp. 30–31), a substantial quantity of that drug is stolen from drug stores—and the thief presumably would acquire it in or from its stamped package. We believe, however, that this Court need not now decide whether the presumption could validly be applied to one found in possession solely of the quantity of cocaine involved herein. For the inference authorized by Section 4704(a) was clearly warranted in the circumstances of this case. Petitioner was found in possession of, not only the cocaine, but also a quantity of heroin strongly suggesting that he was trafficking in narcotics and had acquired the heroin by purchase in the illicit narcotics trade. Moreover, cocaine and heroin are sometimes used in combination by addicts,[33] and the cocaine, as found in petitioner's possession in a mixture with sugar, was not in a form in which it would have been distributed for medicinal purposes in stamped packages (see *supra*, pp. 28–29).[34] All of these circumstances strongly point to the conclusion that petitioner acquired the cocaine, just as he acquired the heroin, by purchase, not in or from the stamped package, in the illicit narcotics trade—regardless of whether the cocaine had been illegally imported (like the heroin) or had been stolen

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[33] Maurer and Vogel, *Narcotics and Narcotic Addiction* (2d ed. 1962) p. 116.

[34] As in *Harris* v. *United States*, 359 U.S. 19, 23, none of the containers found in petitioner's possession had any stamps affixed.

from a drug store (and mixed with the sugar thereafter in the course of distribution).[35]

Accordingly, the decision in *Casey* v. *United States*, 276 U.S. 413, upholding the validity of this presumption, should be reaffirmed as applied to the facts of the present case.[36]

III

NEITHER STATUTORY PRESUMPTION VIOLATES THE PRIVILEGE AGAINST SELF-INCRIMINATION

Petitioner's principal argument is that the use of the statutory presumptions violated his privilege against self-incrimination by impairing the free and unfettered exercise of his right to remain silent. *Amicus* Burgess, phrasing the argument somewhat differently, urges that the presumptions coerce a defendant into testifying, with the attendant danger that he might thus incriminate himself under other federal or state narcotic provisions (*Amicus* Br. 12–15). Our position is that if the requirements of due process have been satisfied—that is, if it is rationally permissible to infer the presumed fact from the proved fact, as we have shown is the situation in this case—then the alleged "coercion" to testify stems, not from any

[35] Moreover, even in the event that the cocaine had been stolen in or from a stamped package, it seems likely that, in order to facilitate concealment, the stamped package would have been discarded even prior to the time of mixing the cocaine with sugar—and probably by the thief himself.

[36] *Amicus* Burgess also argues (*Amicus* Br. 17–20) that, apart from the presumption, 26 U.S.C. 4704(a) violates petitioner's privilege against self-incrimination because of its role as part of a comprehensive narcotics control scheme. This, however, is not an issue embraced within the questions presented by the petition for certiorari in this case.

unconstitutional compulsion, but from the legitimate force of the government's case. A defendant faced with evidence justifying a rational inference of guilt is in a status no different from that of any other defendant who must make the difficult decision whether to testify in order to dispel—if he can—the weight of the government's evidence.

A. THE RATIONAL APPLICATION OF THE PRESUMPTIONS IN THIS CASE DID NOT IMPERMISSIBLY FETTER PETITIONER'S CHOICE AS TO WHETHER TO TESTIFY

As this Court recently pointed out in *Harrison* v. *United States,* 392 U.S. 219, 222:

> A defendant who chooses to testify waives his privilege against compulsory self-incrimination with respect to the testimony he gives, and that waiver is no less effective or complete because the defendant may have been motivated to take the witness stand in the first place only by reason of the strength of the lawful evidence adduced against him.

This is the established rule whether the government's case is based in part on an inference consonant with the experiences of every day life (see *Rugendorf* v. *United States,* 376 U.S. 528, 536–537) or whether its evidence otherwise is such that "the defendant remains quiet at his peril." *Holland* v. *United States,* 348 U.S. 121, 138–139.

The situation is no different in principle whether the basis for the inference or presumption is a rational statutory authorization or a judicially created rule of evidence. In either case, the trial judge has "the responsibility for safeguarding the integrity of

the jury trial" and the ultimate responsibility of deciding whether the government has made a submissible case. *United States* v. *Gainey, supra,* 380 U.S. at 68. We believe, therefore, that the dispositive answer to any argument herein based upon the self-incrimination clause remains that given in *Yee Hem* v. *United States, supra,* 268 U.S. at 185, as follows:

> The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possesion, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution.

Compare *Mobile, J.S.K.C. RR.* v. *Turnipseed,* 219 U.S. 35, 43; *Luria* v. *United States,* 231 U.S. 9, 25–26; *Rossi* v. *United States,* 289 U.S. 89, 91–92; *Morrison* v. *California,* 291 U.S. 82, 88–89, 90–91; *United States* v. *Fleischman,* 339 U.S. 349, 361–363; *Holland* v. *United States,* 348 U.S. 121, 138–139; *Rugendorf* v. *United*

States, 376 U.S. 528, 536–537. Nothing said in *Leary* invalidates or even questions this principle.[37]

Amicus Burgess argues, however, that petitioner could overcome the presumption of knowledge under 21 U.S.C. 174 only by acknowledging possession of the drug, and thereby subjecting himself to a state or federal prosecution on the basis of his admissions (*Amicus* Br. pp. 14–15). Petitioner could, however, have controverted the presumption in other ways, as by offering an alibi or testifying generally as to his lack of familiarity with all narcotic drugs.[38] But there is a more basic response. In every criminal case the defendant is free to admit any or all of the elements of the offense charged. If he should choose to admit all but one of the statutory elements, the statute would not thereby be rendered invalid because his defense might incriminate him under other state or federal laws. The fact that, if he chooses to testify, an accused may have to testify about "incriminating circumstances and events already in evidence" has never been considered to violate the privilege against self-incrimination. See *Johnson* v. *United States*, 318 U.S. 189, 196.

If the rule were otherwise, a defendant could bring almost any criminal prosecution to a halt by contending that if he testified in response to the government's

[37] The sole comment in *Leary* regarding *Yee Hem* was related to the Court's rejection in *Leary* of the comparative convenience test of rationality (see 395 U.S. at 44–45).

[38] Lack of knowledge of illegal importation is a defense to the prosecution. *United States* v. *Llanes*, 374 F. 2d 712 (C.A. 2); *United States* v. *Peeples*, 377 F. 2d 205 (C.A. 2).

case he might incriminate himself under other criminal statutes in some future criminal prosecution. The privilege against self-incrimination has never been given such broad effect. A criminal defendant's decision to take the stand involves a variety of risks, only one of which is that his testimony might be used against him in a subsequent criminal proceeding. One who testifies can be subjected to cross-examination, during the course of which he might make some damaging admissions. One who takes the stand can be impeached through the introduction of prior inconsistent statements. One who testifies can be shown to have perjured himself, or to have given testimony which conflicts with testimony given in other proceedings. If the existence of these risks could be the basis for thwarting a prosecution, our entire system of administering criminal justice would be severely threatened.

In contrast to *Leary* v. *United States,* 395 U.S. 6, *Marchetti* v. *United States,* 390 U.S. 39, *Grosso* v. *United States,* 390 U.S. 62, or *Haynes* v. *United States,* 390 U.S. 85, the present case does not involve a statute which puts the defendant in the dilemma of either not registering thereunder and thus facing prosecution under the statute, or of registering, as the statute requires, and thereby subjecting himself "to a 'real and appreciable' risk of self-incrimination" under other statutes. See *Leary, supra,* 395 U.S. at 12–13; cf. *Garrity* v. *New Jersey,* 385 U.S. 493. Nor can the present case fairly be analogized to the situation where the defendant's testimony is compelled by the introduction of illegal evidence (*Harrison*

v. *United States,* 392 U.S. 219) or where he is compelled to relinquish one constitutional privilege in order to exercise another (*Simmons* v. *United States,* 390 U.S. 377). It is, instead, the force of the government's *lawful* case, under the statutes here at issue, which, puts the defendant to his choice of whether to testify.

Moreover, it is no more than speculation that petitioner would have risked subsequent prosecution under other statutes if he had come forward with evidence in this case. And even if such prosecution would have been attempted, any defenses he might have had thereto should not be available to defeat the instant prosecution, in which the "compulsion" to testify derived soley from the impact of the government's legitimate case. At the very most, the claim that there has been a violation of the privilege requires resolution only if there is such a subsequent prosecution and a defendant's testimony at the earlier trial is sought to be introduced against him. See *Simmons* v. *United States,* 390 U.S. 377, 389–394; *Harrison* v. *United States,* 392 U.S. 219; cf. *Gardner* v. *Broderick,* 392 U.S. 273, 278. That is not the situation here.

B. THE TRIAL COURT'S INSTRUCTIONS CONCERNING THE PRESUMPTIONS DID NOT CONSTITUTE ADVERSE COMMENT ON PETITIONER'S FAILURE TO TESTIFY OR IMPERMISSIBLY ABRIDGE HIS RIGHT TO REMAIN SILENT

Although petitioner did not except to the instructions [39] and did not request the court to instruct the

[39] He did call to the court's attention that it had stated at one point that cocaine rather than heroin was involved in the first count of the indictment (A. 22).

jury that no adverse inference should be drawn from his failure to testify (see *Bruno* v. *United States,* 308 U.S. 287), petitioner now contends that the statutory inferences of Sections 174 and 4704(a), when used in the instructions to the jury, constituted an adverse comment on his silence, and discouraged his right to remain silent. Substantially the same contention was, however, properly rejected by this Court in *United States* v. *Gainey, supra,* a case involving a similar statutory presumption.[40] With respect to the instructions given in *Gainey,* this Court held (380 U.S. at 70):

> The jury was * * * specifically told that the statutory inference was not conclusive. * * * In the absence of the statute, such an instruction to the jury [that the inference is authorized] would surely have been permissible. Cf. *Wilson* v. *United States,* [162 U.S. 613]. Furthermore, in the context of the instructions as a whole, we do not consider the single phrase "unless the defendant by the evidence in the case and by proven facts and circumstances explain such presence to the satisfaction of the jury" can be fairly understood as a comment on the petitioner's failure to testify. Cf. *Bruno* v. *United States,* 308 U.S. 287. The judge's overall reference was carefully directed to the evidence as a whole with neither allusion nor innuendo based on the defendant's decision not to take the stand [footnote omitted].

[40] That is, 26 U.S.C. 5601(b)(2), which permits a jury to infer that a defendant is illegally carrying on the business of a distiller (26 U.S.C. 5601(a)(4)) by virtue of his unexplained presence at the site of the still.

Here, as in *Gainey,* the trial court specifically charged that "the burden of proof cast upon the Government to prove all of the essential elements of the offense charged here does not require that any evidence, even though there is this presumption clause of the statute to be presented by the defendant" (A. 16). The court also told the jury it should return a guilty verdict only if it was convinced beyond a reasonable doubt of the defendant's guilt "in the light of all the evidence as you find it to be, and the inferences which you have determined to draw therefrom, and under the language of the statute and the instructions of the Court * * *" (A. 17). While it might have been better practice, as *Gainey* points out (380 U.S. at 71, n. 7), to omit from the charge any explicit reference to the statutory provisions authorizing the inferences, the instructions as given were adequate—especially in the absence of an exception.

Nor is *Gainey,* inconsistent with *Griffin* v. *California,* 380 U.S. 609, decided less than two months after *Gainey.* In *Griffin,* the trial court instructed the jury that, in determining guilt, it could consider the failure of petitioner to testify as to matters which he could reasonably be expected to deny or explain, and the prosecutor in his summation told the jury to consider this failure to testify as a basis for finding guilt. In reversing the conviction, this Court held that the prosecutor's comment and the court's statements constituted a "penalty imposed by courts for exercising a constitutional privilege" (380 U.S. at 614). Here, however, there was no adverse comment by any-

one concerning petitioner's failure to take the stand. Nor did the Court solemnize "the silence of the accused into evidence against him" (*ibid*). The jury was simply permitted, not directed, to draw rational inferences from the government's circumstantial case. Such instructions, as *Gainey* makes clear, do not constitute an impermissible comment on a defendant's failure to testify. See *Brown* v. *United States*, 370 F. 2d 874, 876 (C.A. 9), certiorari denied, 386 U.S. 1039.[41]

The reasons for rejecting petitioner's contentions based on the privilege against self-incrimination also apply to his claim, based on *United States* v. *Jackson*, 390 U.S. 570, that the instructions impermissibly discouraged his right to remain silent. Where, as here, inferences authorized by statute are rational, their tendency to induce an accused to testify is entirely proper—and does not differ from the effect of any other rational inference which is warranted by the government's evidence.

[41] *Bruno* v. *United States*, 308 U.S. 287, established that the jury can properly be instructed that a defendant has exercised his privilege not to testify and his silence cannot be used as evidence against him. Such an instruction can be given even in the absence of the defendant's request. See, *e.g.*, *Hanks* v. *United States*, 388 F. 2d 171, 175 (C.A. 10); *Bellard* v. *United States*, 356 F. 2d 437 (C.A. 5), certiorari denied, 385 U.S. 856.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed as to Counts One, Two and Four. We suggest, however, that the judgment should be reversed as to Count Three.

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SEPTEMBER 1969.

APPENDIX

Thefts of Drugs For The Calendar Years 1959 Thru 1968 *

Year	Number of Thefts	Medical Opium	Morphine	Codeine	Dionin	Dilaudid	Cocaine	Demerol	Dolophine	Misc. Drugs	Total Drugs
1959	1,369	7,600	5,989	14,372	653	1,189	3,311	5,402	788	12,987	52,355
1960	1,570	6,506	5,831	17,851	815	705	3,397	7,955	1,288	12,728	57,079
1961	1,713	8,381	6,409	25,641	1,045	849	4,090	10,755	1,463	13,583	72,221
1962	1,620	6,745	6,478	22,633	1,067	946	3,035	11,628	1,420	11,363	65,319
1963	1,646	7,264	6,019	25,688	1,096	881	2,782	17,373	2,037	14,511	77,655
1964	1,791	9,617	6,727	29,982	1,187	983	3,957	14,520	1,974	15,854	84,805
1965	2,503	12,918	10,221	50,446	1,787	1,767	6,193	25,279	3,523	20,721	132,859
1966	2,417	9,865	8,582	42,142	1,475	1,899	4,352	22,948	4,152	16,455	111,875
1967	2,181	9,737	7,824	81,829	1,472	1,863	5,033	23,532	2,021	12,881	145,895
1968	2,268	9,982	8,956	63,236	2,760	1,611	5,469	26,330	2,357	15,255	135,962
To'al	19,078	88,710	73,040	373,824	13,361	12,367	41,623	165,727	21,029	146,342	936,028

* The figures in this table represent the total number of grams of each drug reported stolen.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 190

JAMES TURNER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY ON BEHALF OF CLEVELAND BURGESS, AMICUS CURIAE, URGING REVERSAL

INTEREST OF AMICUS CURIAE

On August 15, 1969, Cleveland Burgess filed a brief *amicus curiae* in support of the petitioner, with the consent of the parties. In its subsequent brief, the Government responded to questions raised by the *amicus*, joining issue with most of his arguments and, in one very significant respect (the constitutionality of Count III of the indictment), conceding error and seeking reversal (Gov. Br. 28-32).

Since the arguments now center on the issues so joined, a brief reply is in order. Moreover, the provision by the Government of certain factual data from its files–data which hitherto have not been publically available but which are of value in resolving the legal issues posed by this case–calls for a short rejoinder.

Consequently, with the further consent of the parties, the *amicus curiae* respectfully tenders this reply.

ARGUMENT

In its statement of Questions Presented, the Government asserts that this case involves the application of the due process and self-incrimination provisions of the Fifth Amendment to both statutory presumptions by which the petitioner was convicted.[1] The sum of the Government's defense is that each presumption satisfies the requirements of due process by resting on an asserted "rational connection" between the fact proved and the fact presumed, *Tot v. United States*, 319 U.S. 463, 467-8 (1943) (Gov. Br. 14-34)[2] and, on that account, escapes condemnation under

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[1] The Government responds selectively, however, to interrelated issues posed by the *amicus*. It asserts (Gov. Br. 34, fn. 36) that the self-incriminatory thrust of 26 U.S.C. 4704a, as a part of an overall statutory scheme (*Amicus* Br. 17-20, Arg. IIB), is beyond the issues presented for certiorari, and it offers no rebuttal to the contention that the presumptions of 21 U.S.C. 174 and 26 U.S.C. 4704a violate the Constitution's guarantees of trial by jury (*Amicus* Br. 15-6, Arg. IC). An unlimited grant of certiorari, however, embraces all relevant issues, U.S. Sup. Ct. Rule 23 (1)(c), 28 U.S.C.A.; moreover, this Court has accorded considerable reach to the due process clause–seen by the Government at issue in both questions presented here (Gov. Br. 2)–where penumbrae of other rights protected by the Federal Constitution are touched. See, e.g., *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[2] The Government concedes, however, that there is no rational connection between possession of a package containing 14.68 grams of cocaine hydrochloride and sugar, five percent of which is cocaine, and inference of knowledge of illegal importation in 21 U.S.C. 174, in the light of the high rate of domestically manufactured cocaine

the Constitution as an instrument of self-incrimination (Gov. Br. 34-42).

By its simplicity and straightforwardness, this argument claims too much for rationality and too little for the scope of basic constitutional guarantees. Possession of narcotic drugs gives rise to a range of permissible inferences, other than the predicates of criminality under 21 U.S.C. 174 and 26 U.S.C. 4704a. (Arg. I). Moreover, even if the instant presumptions are "rational", the practical compulsion they work upon juries to reach guilty verdicts with "no evidence at all" as to key elements of the offense charged, *Tot v. United States*, 319 U.S. at 473 (concurring opinion), violates the Constitution's most fundamental procedural safeguards of fair trial. (Arg. II).

I. BOTH EMPIRICALLY AND LOGICALLY, THE STATUTORY PRESUMPTIONS OF 21 U.S.C 174 AND 26 U.S.C. 4704a FAIL TO SATISFY THE TEST OF RATIONALITY REQUIRED BY DUE PROCESS OF LAW.

On a mere showing of possession of narcotic drugs, Federal courts regularly convict hapless defendants on the tortured and illogical presumptions of 21 U.S.C. 174 and 26 U.S.C. 4704a. "It is not too much to say that the presumptions created by the law are violent, and inconsistent with any argument drawn from experience." *Tot v. United States*, 319 U.S. at 468. Both empirical and logical analysis condemns their use as arbitrary, and, consequently, contrary to due process of law.

A.

In urging affirmance of Count I (regarding heroin) and reversal of Count III (regarding cocaine), the Government asks this Court to measure the constitutionality of 21 U.S.C. 174 by a line that conforms in no identifiable way

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that is reported to find its way, through theft, into the illicit narcotics trade. (Gov. Br. 28-32).

with Congressional intent in controlling harmful drugs. Nor can a fair reading of available data sustain the rationality of such a line. The Government argues, on the one hand, that, since cocaine disappears out of legal channels in significant and measurable quantities, it is reasonable to presume that a possessor of cocaine knows his drug to have been unlawfully imported; on the other hand, the Government asserts, the same finding cannot be reported with respect to thefts of heroin lawfully present in the United States, so the presumption must be rational as applied to that drug.

By recognizing the multiple contingencies pertinent to the origins of processed narcotic drugs, this attempt to distinguish between cocaine and heroin confirms the pattern of logically valid alternative origins outlined for heroin in the main brief of the *amicus curiae* (pp. 8-11). Both cocaine and heroin are derived from plants that customarily grow outside the United States, respectively the coca shrub and the opium poppy (though there are also unimpeachable indications that the opium poppy has been and can be grown successfully in the United States, *Amicus* Br. 10-11, Gov. Br. 22-3, and though there is also evidence, Gov. Br. 20, fn. 17, that chemically synthetic heroin can be clandestinely produced). Because cocaine is openly manufactured under license in the United States for distribution through medical channels, thefts of that drug in processed form can be detected and recorded by the U.S. Bureau of Narcotics and Drug Abuse. To the extent the culture of heroin may appear to differ significantly from that of cocaine, any such difference must necessarily reflect the Bureau's disparate record-keeping capabilities and patterns of enforcement with respect to traffic that is, on the one hand, essentially clandestine and, on the other essentially legitimate.

In essence, then, the Government's attempt to differentiate between the origins of cocaine and heroin is based on its own ability to recognize that some cocaine—lawfully im-

ported and processed domestically, is directly available in illicit channels, and on its inability—or its unwillingness—to credit similar possibilities for heroin (based necessarily on clandestine rather than open domestic manufacture). Nonetheless, Government statistics aggregating thefts of the three regulated narcotics from which heroin may be derived—medical opium, morphine, and *codeine*[3]—suggest the possibility that the proportion of domestically processed heroin from sources not unlawfully imported is far in excess[4] of the "less than one percent of the estimated 1,500 kilograms of heroin smuggled into the United States annually" claimed by the Government. (Gov. Br. 20-21). Moreover, a recent Federal campaign to impose restrictions on the sale and dispensation of common cough syrups (containing codeine) and paregoric[5] points to an additional

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[3]There are authoritative indications that the chemical sources of heroin include the widely distributed pain-killer codeine, in addition to medical opium and morphine. Thus the Permanent Central Opium Board reported in 1953, as follows:

> "The Board learned that, in 1951 and for the first time, codeine had been converted into morphine. The government which reported this operation announced that 26 kg. of codeine had been used to produce 18 kg. of morphine, which is equivalent to a yield of about 70 percent." Permanent Central Opium Board, "Legal Trade in Narcotics in 1951," 5 Bulletin on Narcotics 48, 50 (No. 1, Jan-March, 1953) (United Nations)

[4]Applying appropriate conversion factors, as stated by the Government (Gov. Br. 19, fn. 15) and drawn from the previous footnote, to the quantities of regulated narcotics reported stolen in the year 1967 (Gov. Br. 44, Appendix) yields the following quantities of heroin able to be so produced—

Source	*Quantity Stolen* (kg)	*Conversion Factor*	*Heroin* (kg)
Medical opium	9.7	12.9/1	.8
Morphine	7.8	10.2/10.2	7.8
Codeine	81.8	26/18*	57.3
	*(Conversion to Morphine)	TOTAL	65.9 kg

[5]On September 30, 1969, Mr. John E. Ingersoll, Director, U. S. Bureau of Narcotics and Drug Abuse stated that "hundreds of thou-

source of supply as handy as the front counter of the corner drugstore or supermarket. Consequently, the domestically manufactured supply of heroin may be even greater than that assumed from theft alone. For a recent conviction for so manufacturing a narcotic drug by culling opium from paregoric, see *Bibb v. Commonwealth*, 113 S.E.2d 798, 201 Va. 799 (1960).

Thus, while it is not surprising that a great volume of heroin is seized by Federal agents at ports and borders and by cooperating agents overseas each year (in the light of the deployment of such agents and the visibility of the traffic they monitor)[6], such statistics have, of course, absolutely no validity as a basis for rational inference regarding the amount of heroin domestically manufactured. Nor is it surprising that the Director of the Bureau of Narcotics can report that "we have not found a single clandestine laboratory for many years" (Gov. Br. 19), since kitchen laboratories are so notoriously easy to hide. More than words, perhaps, it is appropriate to look to the Govern-

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sands" of Americans are seriously misusing such preparations for their narcotic properties, indicating that Federal regulations effective October 10, 1969 will henceforth require that cough syrups containing low percentages of codeine and paregoric be sold only by registered pharmacists, to persons over 18 (unless by prescription), and in limited quantities. The New York *Times*, October 1, 1969, p. 19. In his prepared speech to which the above press-conference remarks relate, Mr. Ingersoll also asserted that "many new dangerous substances have found their way into the illicit market." He said that,

> "The discovery and production of these substances is a classic example of American know-how and ingenuity. Whoever says that the age of the small entrepreneur is a thing of the past in America, need only look at the drug 'scene' as it exists today for contradiction." Ingersoll, "New Horizons in Federal Control of Drug Abuse", U. S. Bureau of Narcotics and Dangerous Drugs, September 30, 1969 (xerox), p. 7.

[6]In the year 1967, 70.74 kg of heroin was seized at U. S. ports and borders, while 170.105 kg was seized overseas in cooperation with the U. S. See U. S. Bureau of Narcotics, Report on Traffic in Opium and Other Dangerous Drugs (1967) p. 43.

ment's actions in judging the seriousness with which the Government views the prospect of domestic manufacture of heroin; in this context, the recent prosecution in *U.S. v. Haden*, 397 F.2d 460 (C.A. 7, 1968), involving an effort to manufacture heroin from morphine sulfate, confirms the thorough-going realism of domestic manufacture as a source of heroin.

Beyond this point, the prospect of domestic manufacture being thus substantiated as a logical source of heroin, precise measurement is not needed to defeat the rationality of the presumption of foreign importation. In *Tot*, for example, this court was not concerned to determine the specific likelihood of firearm transactions occurring intrastate or prior to the effective date of the statute. Nor in *U.S. v. Romano*, 382 U.S. 136 (1966) was this Court interested in ascertaining the specific probability that persons present at stills might be engaged in activities other than those prohibited by the statute. In those instances, as here, substantiation of the existence of a realistic alternative to the fact presumed was sufficient to defeat the statutory inference.

However, even if it be assumed that the presumption of illegal importation is valid, *Leary v. U.S.*, 395 U.S. 6 (1969) teaches that the further presumption of 21 U.S.C. 174 concerning knowledge of illegal importation must fall. In *Leary* it was pointed out that–

> "Once it is established that a significant percentage of domestically consumed marihuana *may not have been imported at all*, then it can no longer be postulated, without proof, that possessors will be even roughly aware of the proportion actually imported." 395 U.S. at 46. (emphasis added)

With respect to domestically consumed heroin, the foregoing analysis suggests that the test is satisfied and that proof must consequently be supplied to support the presumption of knowledge. Seeking to discharge this burden, the Government's reliance on "widespread notoriety in the

news media—both on television and in the press" (Gov. Br. 26)—is patently inadequate and, indeed, misleading.

To the contrary, the indications are legion that lower-echelon participants in heroin traffic are by and large drawn from the lowest levels of society—poor, uneducated, and ethnically disadvantaged. See for example, Hearings before a Subcommittee of the House Ways and Means Committee, "Traffic in Narcotics," 84th Congress, 1st Sess. (1955), pp. 1301-1507 *passim*; U. S. Bureau of Narcotics, Report on Traffic in Opium and Other Dangerous Drugs (1967), p. 49. In 1967, the President's Commission on Law Enforcement and the Administration of Justice reported:

> "In the states where heroin addiction exists on a large scale, it is an urban problem. Within the cities it is largely found in areas with low average incomes, poor housing, and high delinquency. The addict himself is likely to be male, between the ages of 21 and 30, poorly educated and unskilled, and a member of a disadvantaged ethnic minority group." The President's Commission on Law Enforcement and the Administration of Justice, Report: "The Challenge of Crime in a Free Society", pp. 212-3 (1967).

Authoritative studies indicate that heroin users neither know nor care much about their drug, or indeed about the world in which they live. See Blum, "Mind-Altering Drugs and Dangerous Behavior: Narcotics", in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: "Narcotics and Drug Abuse" (1967) pp. 50-52; White House Conference Panel on Drug Abuse, Report, p. 290 (1962); and Chien, *The Road to H* (1964), pp. 52-3.

In sum, the conclusion flatly stated by the Court of Appeals for the Tenth Circuit in *Griego v. U.S.*, 298 F.2d 545, 549 (1962), is also applicable here, that

> "it is probable that many narcotic offenders can testify truthfully that they had no knowledge of un-

> lawful importation. Those so engaged are not concerned with the primary sources of the contraband commodity."

Thus the presumption of knowledge of unlawful importation cannot be sustained on a finding that most heroin possessors know either of the origins of their drugs or of heroin in general. By this token, the presumption of knowledge is clearly irrational.

B.

The Government asserts that the statutory presumption contained in 26 U.S.C. 4704a satisfies the requirements of due process inasmuch as it too rests on a purportedly rational base. The Government urges that "the decision in *Casey v. United States,* 276 U.S. 413, upholding the validity of this presumption should be reaffirmed as applied to the facts of the present case." (Gov. Br. 32-4). Indeed, read in the light of these facts, the holding of *Tot* strongly suggests that the presumption of violation arising from mere possession should now be invalidated and *Casey* specifically overruled.

Tot recited a carefully limited basis for the holding in *Casey,* that

> "the presumption created by the statute that a *sale* of morphine from an unstamped package should be prima facie evidence of a similar *purchase* was not unreasonable or beyond the realm of common experience." 319 U.S. at 472 (emphasis added)

Here, by contrast, the fact from which the presumption arises is possession by three individuals of small quantities of narcotics, about seven grams of heroin and .7 grams of cocaine, a situation without pecuniary overtones. Illustrating the indifference to procedural fairness which has overtaken the application of the presumption, Counts II and IV charged, tautologically, that Turner did

> "knowingly, wilfully and unlawfully, purchase, *possess,* and dispense and distribute a narcotic drug . . ." (App. 7-8) (emphasis added).

To the extent conviction thereunder is not *ipso facto* reversible as inconsistent with the statutory authority of 26 U.S.C. 4704a, the application of the presumption is clearly irrational. The presumption from possession may not rationally be applied to convict Turner of having sold, dispensed, or distributed a narcotic drug, since these acts would, obviously, follow after his possession. Moreover, the statute's recognition of these three alternative modes of *passing on* a narcotic drug (along with the exemptions to the coverage of Subsection (a) set forth in Subsection (b) of Section 4704) surely suggests that there are ways, other than purchase, by which Turner may have *acquired* the drugs. Under *Tot* and *Romano*, therefore, the inference of violation of 26 U.S.C. 4704a from mere possession is arbitrary, irrational and inconsistent with due process of law.

II. ASIDE FROM THEIR IRRATIONALITY, THE INSTANT PRESUMPTIONS OPERATE TO DEPRIVE THE DEFENDANT OF A FAIR TRIAL

In its brief, the Government takes the position that if a rational connection exists between the fact proven and the fact presumed, statutory presumptions wholly satisfy the requirements of due process and, moreover, compel self-incrimination no more than any evidence justifying the rational inference of guilt. (Gov. Br. 34-5) Rationality is, indeed, a *sine qua non* of due process, but it is not, nor has it ever been, sufficient basis for consistency with the commands of the Constitution. Long ago, this Court held in *Bailey v. Alabama*, 219 U.S. 219 (1910) that

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not an escape from constitutional restrictions." 219 U.S. at 239.

Thus the dilemmas worked by these presumptions must be measured independently against substantive constitutional rights of fair trial procedure.

Bailey teaches, and subsequent cases confirm, that the constitutionality of a statutory presumption must be appraised in the light of its practical effects. In Bailey, where a state statute provided that failure to perform personal services after receiving payment therefor was *prima facie* evidence of intent to defraud, this Court reached the conclusion that the statutory presumption contravened a constitutional right upon the following practical construction–

> "The point is that . . . the statute *authorizes* the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept it as a basis for their verdict." 219 U.S. at 235.

In this context, the presumption in 21 U.S.C. 174 similarly authorizes the jury to convict, though there is "no evidence at all", *Tot v. U.S.*, 319 U.S. at 473 (concurring opinion) with regard to any of the multiple possible origins of the drugs in the defendant's possession or with regard to his knowledge or lack thereof of the many furtive hands through which it may have passed. Similarly, even the presumption in 26 U.S.C. 4704a, authorizing conviction for a number of inferred acts, is sufficiently unrelated to the fact of possession to invoke the requirement of procedural fairness applied in *Tot* and articulated in *Leary* that

> "because of the danger of overreaching it was incumbent upon the prosecution to demonstrate that the inference was permissible before the burden of coming forward could be placed upon the defendant." 395 U.S. at 45, citing *Tot*, 319 U.S. at 469, and distinguishing *Yee Hem v. United States*, 268 U.S. 178, 184 (1925).

Thus, statutory presumptions cannot work to shift the burden of proving guilt from the prosecution to the defendant, as do the presumptions here in question, without violating due process of law. *Morrison v. California*, 291 U.S. 82, 96-7 (1934); *Tot v. United States, supra; Speiser v. Randall*, 357 U.S. 513, 535-6 (1958); *Dombrowski v. Pfister*, 380 U.S. 479, 496 (1965). *U.S. v. Romano*, 382

U.S. 136, 144 (1965). *Leary v. United States, supra,* 395 U.S. at 36, fn. 64 and authorities cited. Nor can these presumptions constitutionally operate to deprive a defendant of other protected rights, *U.S. v. Gainey,* 380 U.S. 63, 83-88 (dissenting opinion), *Leary v. U.S.,* 395 U.S. at 55-6 (concurring opinion)–specifically, in this case, his rights to trial by jury and to freedom from self-incrimination. (*Amicus* Br. 12-20).

CONCLUSION

For the reasons set forth in the brief of the amicus curiae and in this reply brief, the conviction of petitioner Turner should be reversed.

Respectfully submitted,

Steven R. Rivkin

Counsel for Amicus Curiae, Cleveland Burgess
(Appointed by the United States Court of Appeals for the District of Columbia Circuit)

October 6, 1969

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Reply on Behalf of Cleveland Burgess, Amicus Curiae, have been served in hand this 6th day of October, 1969 upon the Office of the Solicitor General, U.S. Department of Justice, and the United States Attorney for the District of Columbia, U.S. Courthouse, Washington, D.C., and by mail, postage prepaid, upon counsel for petitioner, Josiah E. DuBois, Jr., 511 Cooper Street, Camden, N.J. 08101.

Steven R. Rivkin

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 190

JAMES TURNER, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

In his reply brief (p. 5 & n. 3), *Amicus* Burgess argues that the government's brief substantially underestimates the maximum quantity of heroin theoretically available from drugs stolen in this country because the calculations in our brief are restricted to thefts of medical opium and morphine and exclude thefts of codeine, from which a reported 70 percent yield of morphine can be derived.

The Bureau of Narcotics and Dangerous Drugs informs us that the report of a 70 percent yield in the conversion of codeine to morphine referred to in note 3 of the reply brief is, in its opinion, "nothing but a false rumor" because such a yield has never been reported in the scientific literature. The Bureau further informs us, however, that it is possible scientifically to convert (or "reconvert") codeine to morphine by heating codeine with pyridine HCl to cleave the methyl group from the codeine molecule.

365-935—69——1

This process produces a yield of approximately 22 percent. It was first reported by Rapaport, *et al.*, in the Journal of American Chemical Society, Vol. 73, p. 5900, and the process was verified by Gates, *et al.*, in the same journal, Vol. 74, p. 1109 and Vol. 78, p. 1380.[1]

While the process of converting codeine to morphine can be conducted with relative simplicity and with inexpensive equipment, the Bureau informs us that the process could not realistically be used in a clandestine operation. This is because the conversion process would produce an extremely noxious and penetrating odor which would be noticeable over a very large area—the effect on anyone in the vicinity would be at least as offensive as that of a rendering plant. Moreover, morphine produced by this process and heroin derived therefrom would be scientifically distinguishable from normally produced morphine or heroin because they would contain detectable amounts of codeine (which could be eliminated only by recrystallizing the product many times, with a resulting loss of yield).

We believe, therefore, that our brief (pp. 19–21) is accurate in basing calculations of the maximum quantities of heroin theoretically available from stolen drugs in this country solely on the reported thefts of opium and morphine.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1969.

[1] The Bureau also informs us that it might theoretically be possible to convert dionin to morphine by a comparable process, but that such conversion has never been reported.

U.S. GOVERNMENT PRINTING OFFICE: 1969

SUPREME COURT OF THE UNITED STATES

No. 190.—October Term, 1969

James Turner, Petitioner, *v.* United States. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January 20, 1970]

Mr. Justice White delivered the opinion of the Court.

Petitioner was found guilty by a jury on four counts charging violations of the federal narcotics laws. The issue before us is the validity of the provisions of 21 U. S. C. § 174 and 26 U. S. C. § 4704 (a) which authorize an inference of guilt from the fact of possession of narcotic drugs, in this case heroin and cocaine.

The charges arose from seizures by federal narcotics agents of two packages of narcotics. On June 1, 1967, Turner and two companions were arrested in Weehawken, New Jersey, shortly after their automobile emerged from the Lincoln Tunnel. While the companions were being searched but before Turner was searched, the arresting agents saw Turner throw a package to the top of a nearby wall. The package was retrieved and was found to be a foil package weighing 14.68 grams and containing a mixture of cocaine hydrochloride and sugar, 5% of which was cocaine. Government agents thereafter found a tinfoil package containing heroin under the front seat of the car. This package weighed 48.25 grams and contained a mixture of heroin, cinchonal alkaloid, mannitol, and sugar, 15.2% of the mixture being heroin. Unlike the cocaine mixture, the heroin mixture was packaged within the tinfoil wrapping in small double glassine bags;

in the single tinfoil package there were 11 bundles of bags, each bundle containing 25 bags (a total of 275 bags). There were no federal tax stamps affixed to the package containing the cocaine or to the glassine bags or outer wrapper enclosing the heroin.

Petitioner was indicted on two counts relating to the heroin and two counts relating to the cocaine. The first count charged that Turner violated 21 U. S. C. § 174[1] by receiving, concealing, and facilitating the transportation and concealment of heroin while knowing that the heroin had been unlawfully imported into the United States. The third count charged the same offense with regard to the cocaine seized. The second count charged that petitioner purchased, possessed, dispensed, and distributed heroin not in or from the original stamped package in violation of 26 U. S. C. § 4704 (a).[2] The fourth count made the same charge with regard to the cocaine.

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[1] Insofar as here relevant, this section provides:

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned . . . .

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

Heroin, a derivative of opium, and cocaine, a product of coca leaves, are within the meaning of the term "narcotic drug" as used in 21 U. S. C. § 174. 21 U. S. C. § 171, referring to Int. Rev. Code of 1939, c. 27, § 3228 (g), *added* by Act of August 8, 1953, c. 394, § 1, 67 Stat. 505 (now 26 U. S. C. § 4731 (a)).

[2] "It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appro-

At the trial, the Government presented the evidence of the seizure of the packages containing heroin and cocaine but presented no evidence on the origin of the drugs possessed by petitioner. Petitioner did not testify. With regard to Counts 1 and 3, the trial judge charged the jury in accord with the statute that the jury could infer from petitioner's unexplained possession of the heroin and cocaine that petitioner knew that the drugs he possessed had been unlawfully imported. With regard to Counts 2 and 4, the trial judge read to the jury the statutory provision making possession of drugs not in a stamped package "prima facie evidence" that the defendant purchased, sold, dispensed or distributed the drugs not in or from a stamped package. The jury returned a verdict of guilty on each count. Petitioner was sentenced to consecutive terms of 10 years' imprisonment on the first and third counts; a five-year term on the second count was to run concurrently with the term on the first count and a five-year term on the fourth count was to run concurrently with the term on the third count.

On appeal to the Court of Appeals for the Third Circuit, petitioner argued that the trial court's instructions on the inferences that the jury might draw from unexplained possession of the drugs constituted violations of his privilege against self-incrimination by penalizing him for not testifying about his possession of the drugs. The Court of Appeals rejected this claim and affirmed, finding that the inferences from possession authorized by the statutes were permissible under prior decisions of this Court and that therefore there was no impermissible

priate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found."

The term "narcotic drugs" is defined to include derivatives of opium and products of coca leaves. 26 U. S. C. § 4731 (a).

penalty imposed on petitioner's exercise of his right not to testify. 404 F. 2d 782 (1968). After the Court of Appeals' decision in this case, this Court held that a similar statutory presumption applicable to the possession of marihuana was unconstitutional as not having a sufficient rational basis. *Leary* v. *United States*, 395 U. S. 6 (1969). We granted a writ of certiorari in this case to reconsider in light of our decision in *Leary* whether the inferences authorized by the statutes here at issue are constitutionally permissible when applied to the possession of heroin and cocaine.

I

The statutory inference created by § 174 has been upheld by this Court with respect to opium and heroin, *Yee Hem* v. *United States*, 268 U. S. 178 (1925); *Roviaro* v. *United States*, 353 U. S. 53 (1957), as well as by an unbroken line of cases in the courts of appeals.[3] Similarly, in a case involving morphine, this Court has re-

[3] Decisions of the Courts of Appeals accepting application of the presumption to persons found in possession of opium, morphine or heroin include *Gee Woe* v. *United States*, 250 F. 428 (C. C. A. 5th Cir.), cert. denied, 248 U. S. 562 (1918) (smoking opium); *Charley Toy* v. *United States*, 266 F. 326 (C. C. A. 2d Cir.), cert. denied, 254 U. S. 639 (1920) (smoking opium); *Copperthwaite* v. *United States*, 37 F. 2d 846 (C. C. A. 6th Cir. 1930) (morphine); *United States* v. *Moe Liss*, 105 F. 2d 144 (C. C. A. 2d Cir. 1939) (morphine); *Dear Check Quong* v. *United States*, 82 U. S. App. D. C. 8, 160 F. 2d 251 (1947) (unspecified narcotics); *Cellino* v. *United States*, 276 F. 2d 941 (C. A. 9th Cir. 1960) (heroin); *Walker* v. *United States*, 285 F. 2d 52 (C. A. 5th Cir. 1960) (heroin); *United States* v. *Savage*, 292 F. 2d 264 (C. A. 2d Cir.), cert. denied, 368 U. S. 880 (1961) (heroin); *United States* v. *Gibson*, 310 F. 2d 79 (C. A. 2d Cir. 1962) (heroin); *Lucero* v. *United States*, 311 F. 2d 457 (C. A. 10th Cir. 1962), cert. denied sub nom. *Maestas* v. *United States*, 372 U. S. 936 (1963) (heroin); *Garcia* v. *United States*, 373 F. 2d 806 (C. A. 10th Cir. 1967) (heroin).

jected a constitutional challenge to the inference authorized by § 4704 (a). *Casey* v. *United States,* 276 U. S. 413 (1928).

Leary v. *United States, supra,* dealt with a statute, 21 U. S. C. § 176 (a), providing that possession of marihuana, unless explained to the jury's satisfaction, "shall be deemed sufficient evidence to authorize conviction" for smugging, receiving, concealing, buying, selling, or facilitating the transportation, concealment or sale of the drug, knowing that it had been illegally imported. Referring to prior cases [4] holding that a statute authorizing the inference of one fact from the proof of another in criminal cases must be subjected to scrutiny by the courts to prevent "conviction upon insufficient proof," 395 U. S., at 37, the Court read those cases as requiring the invalidation of the statutorily authorized inference "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." 395 U. S., at 36. Since, judged by this standard, the inference drawn from the possession of marihuana was invalid, it was unnecessary to "reach the question whether a criminal presumption which passes muster when so judged must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." 395 U. S., at 36 n. 64.

We affirm Turner's convictions under §§ 174 and 4704 (a) with respect to heroin (Counts 1 and 2) but reverse the convictions under these sections with respect to cocaine (Counts 3 and 4).

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[4] Especially *Tot* v. *United States,* 319 U. S. 463 (1943), *United States* v. *Gainey,* 380 U. S. 63 (1965), and *United States* v. *Romano,* 382 U. S. 136 (1965).

II

We turn first to the conviction for trafficking in heroin in violation of § 174. Count 1 charged Turner with (1) knowingly receiving, concealing and transporting heroin which (2) was illegally imported and which (3) he knew was illegaly imported. See *Harris* v. *United States*, 359 U. S. 19, 23 (1959). For conviction, it was necessary for the Government to prove each of these three elements of the crime to the satisfaction of the jury beyond a reasonable doubt. The jury was so instructed and Turner was found guilty.

The proof was that Turner had knowingly possessed heroin; since it is illegal to import heroin or to manufacture it here,[5] he was also chargeable with knowing that his heroin had an illegal source. For all practical purposes, this was the Government's case. The trial judge, noting that there was no other evidence of importation or of Turner's knowledge that his heroin had come from abroad, followed the usual practice and instructed the jury—as § 174 permits but does not require—that possession of a narcotic drug is sufficient evidence to justify conviction of the crime defined in § 174.[6]

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[5] See *infra*, nn. 12, 13.

[6] Under prior decisions, principally *United States* v. *Gainey*, 380 U. S. 63 (1965), such statutory provisions authorize but do not require the trial judge to submit the case to the jury when the Government relies on possession alone, authorize but do not require an instruction to the jury based on the statute, and authorize but do not require the jury to convict based on possession alone. The defendant is free to challenge either the inference of illegal importation or the inference of his knowledge of that fact, or both. *Harris* v. *United States*, 359 U. S. 19, 23 (1959); *Roviaro* v. *United States*, 353 U. S. 53, 63 (1957); *Yee Hem* v. *United States*, 268 U. S. 178, 185 (1925); *United States* v. *Peeples*, 377 F. 2d 205

The jury, however, even if it believed Turner had possessed heroin, was not required by the instructions to find him guilty. The jury was instructed that it was the sole judge of the facts and the inferences to be drawn therefrom, that all elements of the crime must be proved beyond a reasonable doubt and that the inference authorized by the statute did not require the defendant to present evidence. To convict, the jury was informed, it "must be satisfied by the totality of the evidence irrespective of the source from which it comes of the guilt of the defendant . . . ." The jury was obligated by its instructions to assess for itself the probative force of possession and the weight, if any, to be accorded the statutory inference. If it is true, as the Government contends, that heroin is not produced in the United States and that any heroin possessed here must have originated abroad, the jury, based on its own store of knowledge, may well have shared this view and concluded that Turner was equally well informed. Alternatively, the jury may have been without its own information concerning the sources of heroin, and may have convicted Turner in reliance on the inference permitted by the statute, perhaps reasoning that the statute represented

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(C. A. 2d Cir. 1967); *Chavez* v. *United States*, 343 F. 2d 85 (C. A. 9th Cir. 1965); *Griego* v. *United States*, 298 F. 2d 845 (C. A. 10th Cir. 1962). Even when the defendant challenges the validity of the inference as applied to his case, the instruction on the statutory inference is normally given. See, *e. g.*, *McIntyre* v. *United States*, 380 F. 2d 746 (C. A. 9th Cir.), cert. denied, 389 U. S. 952 (1967); *United States* v. *Peeples*, *supra*; *Vick* v. *United States*, 113 U. S. App. D. C. 12, 304 F. 2d 379 (1962); *Griego* v. *United States*, *supra*; *Walker* v. *United States*, 285 F. 2d 52 (C. A. 5th Cir. 1960); *Feinberg* v. *United States*, 123 F. 2d 425 (C. C. A. 7th Cir. 1941), cert. denied, 315 U. S. 801 (1942). See also *Erving* v. *United States*, 323 F. 2d 674 (C. A. 9th Cir. 1963); *Caudillo* v. *United States*, 253 F. 2d 513 (C. A. 9th Cir.), cert. denied sub nom. *Romero* v. *United States*, 357 U. S. 931 (1958).

an official determination that heroin is not a domestic product.[7]

Whatever course the jury took, it found Turner guilty beyond a reasonable doubt and the question on review is the sufficiency of the evidence, or more precisely, the soundness of inferring guilt from proof of possession alone. Since the jury might have relied heavily on the inferences authorized by the statute and included in the court's instructions, our primary focus is on the validity of the evidentiary rule contained in § 174.[8]

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[7] In *United States* v. *Peeples*, 377 F. 2d 205 (C. A. 2d Cir. 1967), the jury, after deliberating for a time, asked the judge about the percentage of heroin in the United States that is produced illegally in this country. "As there was no evidence in the record concerning areas of the world where heroin is produced, the judge declined to answer the . . . inquiry . . . ." 377 F. 2d, at 208. The defendant was found guilty by the jury; however, the Court of Appeals reversed for reasons not directly related to the trial judge's treatment of the question about the origins of heroin possessed in this country.

[8] See *Leary* v. *United States*, 395 U. S. 6, 31–32 (1969); *United States* v. *Romano*, 382 U. S. 136, 138–139 (1965); *Bailey* v. *Alabama*, 219 U. S. 219, 234–235 (1911).

Arguably, in declaring possession to be ample evidence to convict for trafficking in illegally imported drugs, Congress in effect has made possession itself a crime as an incident to its power over foreign commerce. Cf., *Ferry* v. *Ramsey*, 277 U. S. 88 (1928). But the crime defined by the statute is not possession and the Court has rejected this basis for sustaining this and similar statutory inferences. *Leary* v. *United States*, *supra*, at 34, 37; *United States* v. *Romano*, *supra*, at 142–144; *Harris* v. *United States*, 359 U. S. 19, 23 (1959); *Roviaro* v. *United States*, 353 U. S. 53, 62–63 (1957); *Tot* v. *United States*, 319 U. S. 463, 472 (1943).

The Court has also refused to accept the suggestion that since the source of his drugs is perhaps more within the defendant's knowledge than the Government's, it violates no rights of the defendant to permit conviction based on possession alone when the defendant refuses to demonstrate a legal source for his drugs. *Leary* v. *United States*, *supra*, at 32–34. See also *Tot* v. *United States*,

We conclude first that the jury was wholly justified in accepting the legislative judgment—if in fact that is what the jury did—that possession of heroin is equivalent to possessing imported heroin. We have no reasonable doubt that at the present time heroin is not produced in this country and that therefore the heroin Turner had was smuggled heroin.

Section 174 or a similar provision has been the law since 1909.[8] For 60 years defendants charged under the statute have known that the section authorizes an inference of guilt from possession alone, that the inference is rebuttable by evidence that their heroin originated here, and that the inference itself is subject to challenge for lack of sufficient connection between the proved fact of possession and the presumed fact that theirs was smuggled mechandise. *Mobile, J. & K. C. R.* v. *Turnipseed*, 219 U. S. 35, 43 (1910). Given the statutory infer-

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supra, at 469–470. The difficulties with the suggested approach are obvious: if the Government proves only possession and if possession is itself insufficient evidence of either importation or knowledge, but the statute nevertheless permits conviction where the defendant chooses not to explain, the Government is clearly relieved of its obligation to prove its case, unaided by the defendant, and the defendant is made to understand that if he fails to explain he can be convicted on less than sufficient evidence to constitute a prima facie case. See *Tot* v. *United States*, *supra*, at 469.

[8] The original provision, applicable to opium and derivatives, was contained in the Act of February 9, 1909, c. 100, § 2, 35 Stat. 614. It was revised and extended to cover cocaine and coca leaves by the Act of May 26, 1922, c. 202, § 1, 42 Stat. 596. The provision establishing the presumption was adopted without extended discussion or debate; it was consciously modeled on a provision of § 3082 of the Revised Statutes (now 18 U. S. C. § 545), originating in the Smuggling Act of 1866, c. 201, § 4, 14 Stat. 179. See H. R. Rep. No. 1878, 60th Cong., 2d Sess., 1–2 (1909); H. R. Rep. No. 2003, 60th Cong., 2d Sess., 1 (1909). See also Sandler, The Statutory Presumption in Federal Narcotics Prosecutions, 57 J. Crim. L., C. & P. S. 7 (1966).

ence and absent rebuttal evidence, as far as a defendant is concerned the § 174 crime is the knowing possession of heroin. Hence, if he is to avoid conviction, he faces the urgent necessity either to rebut or to challenge successfully the possession inference by demonstrating the fact or the likelihood of a domestic source for heroin, not necessarily by his own testimony but through the testimony of others who are familiar with the traffic in drugs, whether government agents or private experts. Over the years, thousands of defendants, most of them represented by retained or appointed counsel, have been convicted under § 174. Although there was opportunity in every case to challenge or rebut the inference based on possession, we are cited to no case, and we know of none, where substantial evidence showing domestic production of heroin has come to light. Instead, the inference authorized by the section, although frequently challenged, has been upheld in this Court and in countless cases in the district courts and courts of appeals, these cases implicitly reflecting the prevailing judicial view that heroin is not made in this country but rather is imported from abroad. If this view is erroneous and heroin is or has been produced in this country in commercial quantities, it is difficult to believe that resourceful lawyers with adversary proceedings at their disposal would not long since have discovered the truth and placed it on record.

This view is supported by other official sources. In 1956, after extensive hearings, the Senate Committee on the Judiciary found no evidence that heroin is produced commercially in this country.[10] The President's

[10] In 1955 the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary held hearings throughout the country on the illicit narcotics traffic in this country. The subcommittee heard 345 witnesses, including government officials, law enforcement officers, and addicts and narcotics law violators; the testimony heard covers several thousand

Commission on Law Enforcement and Administration of Justice stated in 1967 that "[a]ll the heroin that reaches the American user is smuggled into the country from abroad, the Middle East being the reputed primary point of origin." [11]

The factors underlying these judgments may be summarized as follows: First, it is plain enough that it is illegal both to import heroin into this country [12] and

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pages. Hearings on Illicit Narcotics Traffic before the Subcommittee on Improvements in the Federal Criminal Code of the Senate Committee on the Judiciary, 84th Cong., 1st Sess. (1955) (hereinafter cited as 1955 Senate Hearings). The evidence gathered in these hearings was the basis of S. 3760, 84th Cong., 2d Sess. (1956). The Senate bill contained a section (proposed § 1402, Tit. 18) very similar to § 174 but applicable exclusively to heroin; this proposed section included the § 174 presumption. Another proposed section (proposed § 1403, Tit. 18, enacted with minor changes and now codified in 21 U. S. C. § 176b) authorized special, severe penalties for the sale of unlawfully imported heroin to juveniles; this section contained a provision that possession of heroin was sufficient to prove that the heroin had been illegally imported. See S. Rep. No. 1997, 84th Cong., 2d Sess. 30 (1956) (proposed §§ 1402, 1403). The presumption that heroin found in this country has been illegally imported was based on findings of the Committee that foreign sources supply all important quantities of heroin circulating in this country. S. Rep. No. 1997, 84th Cong., 2d Sess. 3–7 (1956); and this finding was in turn based on ample evidence presented to the Subcommittee on Improvements in the Federal Criminal Code. See 1955 Senate Hearings 90 (testimony of Commissioner Anslinger of the Federal Bureau of Narcotics).

[11] President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Narcotics and Drug Abuse 3 (1967) (hereinafter cited as Task Force Report). See also U. N. Commission on Narcotic Drugs, Report of the Eighteenth Session 15 (1963); S. Jeffee, Narcotics—An American Plan 12–14, 63–71 (1966).

[12] 21 U. S. C. § 173 makes it unlawful to import any narcotic drug except amounts of crude opium and coca leaves necessary to provide for medical and legitimate uses. In addition, for more than 45 years, it has been unlawful to import opium for the purpose

to manufacture it here;[13] heroin is contraband and is subject to seizure.[14]

Second, heroin is a derivative of opium and can be manufactured from opium or from morphine or codeine, which are also derived from opium.[15] Whether heroin

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of manufacturing heroin. Act of June 7, 1924, c. 352, 43 Stat. 657 (now codified in 21 U. S. C. § 173). Though 21 U. S. C. § 513 permits the Secretary of the Treasury to authorize the importation of any narcotic drug for delivery to governmental officials or to any person licensed to use the drugs for scientific purposes, the Secretary has never authorized the importation of any heroin under this provision. Brief for the United States 18, n. 12.

[13] The Narcotics Manufacturing Act of 1960, 21 U. S. C. §§ 501–517, prohibits the manufacture of narcotic drugs except under a license issued by the Secretary of the Treasury for the production of an approved drug. Since heroin is not considered useful for medical purposes, no production for medical use has been authorized; heroin used in scientific experimentation is supplied entirely from quantities seized by law enforcement officials. Brief for the United States 17, n. 10.

[14] 21 U. S. C. § 173. See S. Rep. No. 1997, 84th Cong., 2d Sess. 7 (1956). In 1956, all heroin then lawfully outstanding was required to be surrendered. Act of July 18, 1956, c. 629, § 201, 70 Stat. 572 (codified as 18 U. S. C. § 1402).

[15] The clandestine manufacture of heroin from opium or morphine is said in one report to be "child's play." Vaille & Bailleul, Cladestine Heroin Laboratories, 5 Bulletin on Narcotics, No. 4, Oct.-Dec. 1953, at 1, 6. The possibility of producing heroin from codeine (with a yield of about 22%) was first reported in Rapoport, Lovell & Tolbert, The Preparation of Morphine-N-methyl-C^{14}, 73 J. Am. Chem. Soc. 5900 (1951), and was verified in Gates & Tschudi, The Synthesis of Morphine, 74 J. Am. Chem. Soc. 1109 (1952). The Bureau of Narcotics and Dangerous Drugs reports that conversion of codeine into morphine (from which heroin may be produced) is relatively simple and requires inexpensive equipment but produces an extremely noxious and penetrating odor which would make concealment of such conversion operations virtually impossible. Supplemental Memorandum for the United States 2.

can be synthesized is disputed, but there is no evidence that it is being synthesized in this country.[16]

Third, opium is derived from the opium poppy which cannot be grown in this country without a license.[17] No licenses are outstanding for commercial cultivation [18] and there is no evidence that the opium poppy is illegally grown in the United States.[19]

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[16] The Bureau of Narcotics and Dangerous Drugs reports that it knows of no case in which synthetic heroin has been produced; it reports that experiments indicate that production of synthetic morphine would be extremely difficult. Brief for the United States 20, n. 17. *Amicus* Burgess suggests the possibility of synthetic production of heroin but cites in support only a case involving an unsuccessful attempt to synthesize morphine, *United States* v. *Liss*, 137 F. 2d 995 (C. C. A. 2d Cir.), cert. denied, 320 U. S. 773 (1943). Brief for Cleveland Burgess as *Amicus Curiae* 11.

[17] Opium Poppy Control Act of 1942, 21 U. S. C. §§ 188–188n.

[18] The regulations provide that a license to produce opium poppies shall be issued only when it is determined by the Director of the Bureau of Narcotics and Dangerous Drugs that the medical and scientific needs of the country cannot be met by the importation of crude opium. 21 CFR § 303.5 (a). Imports of crude opium have been sufficient to meet all domestic medical and scientific needs and the United States is therefore not an opium-producing country. Blum & Braunstein, Mind-Altering Drugs and Dangerous Behavior: Narcotics, in Task Force Report App. A–2, at 40. See also Brief for the United States 23, n. 25.

[19] The most recent reported case involving a prosecution for unlawful production of opium poppies is *Az Din* v. *United States*, 232 F. 2d 283 (C. A. 9th Cir.), cert. denied, 352 U. S. 827 (1956). Unlike the case of marihuana, see *Leary*, *supra*, at 42–43, there are no reports of the discovery in this country of fields of opium poppies requiring destruction. This fact together with the facts that opium poppies are hard to conceal because of their color and that the harvesting of opium is only economically feasible in countries with an abundant supply of cheap labor justifies a conclusion that little if any opium poppy production is going on in this country. See Brief for the United States 21–23.

Fourth, the law forbids the importation of any opium product except crude opium required for medical and scientific purposes;[20] importation of crude opium for the purpose of making heroin is specifically forbidden.[21] Sizable amounts of crude opium are legally imported and used to make morphine and codeine.[22]

Fifth, the flow of legally imported opium and of legally manufactured morphine and codeine is controlled too tightly to permit any significant possibility that heroin is manufactured or distributed by those legally licensed to deal in opium, morphine, or codeine.[23]

Sixth, there are recurring thefts of opium, morphine, and codeine from legal channels which could be used for the domestic, clandestine production of heroin.[24] It

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[20] 21 U. S. C. § 173.

[21] 21 U. S. C. § 173. See *supra*, n. 12.

[22] In 1966, the United States imported 173,951 kilograms of crude opium; in the same year, 715 kilograms of morphine and 30,662 kilograms of codeine were produced from imported opium. U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs, Report for the Year Ended December 31, 1967, at 41 (1968).

[23] The manufacture of narcotic drugs is very carefully controlled and monitored under the Narcotics Manufacturing Act of 1960, 21 U. S. C. §§ 501–517. The subsequent distribution of narcotic drugs is controlled and monitored under the laws enforcing the taxes imposed on those dealing in narcotic drugs. 26 U. S. C. §§ 4701–4707, 4721–4736, 4771–4776.

[24] Because of the controls and reporting requirements applicable to those handling narcotic drugs, see *supra*, n. 23, the Bureau of Narcotics and Dangerous Drugs can compile accurate figures on the quantities of narcotic drugs stolen from legitimate channels. From 1964 through 1968, total thefts of medical opium per year ranged from 9.6 kilograms to 12.9 kilograms; thefts of morphine for the same period ranged from 6.7 kilograms to 10.2 kilograms per year; annual thefts of codeine for the same years ran between 30.0 kilograms and 81.8 kilograms. Brief for the United States 44. On the possibility of clandestine manufacture of heroin from opium, morphine, and codeine, see *supra*, n. 15.

is extremely unlikely that heroin would be made from codeine since the process involved produces an unmanageable, penetrating stench which it would be very difficult to conceal.[25] Clandestine manufacture of heroin from opium and morphine would not be subject to this difficulty; but, even on the extremely unlikely assumption that all opium and morphine stolen each year is used to manufacture heroin, the heroin so produced would amount to only a tiny fraction (less than 1%) of the illicit heroin illegally imported and marketed here.[26] Moreover, a clandestine laboratory man-

[25] See *supra*, n. 15.

[26] Using figures on the number of known addicts and the average daily dose, federal agencies estimate that roughly 1,500 kilograms of heroin are smuggled into the United States each year. Task Force Report 6. The Bureau of Narcotics and Dangerous Drugs estimates that no more than about one kilogram of heroin could have been produced if all the opium stolen in any recent year had been clandestinely converted into heroin. The largest total amount of morphine stolen in a recent year would have yielded about 10.2 kilograms of heroin if it had all been converted into heroin. Brief for the United States 19, n. 15.

If it were assumed that all stolen codeine is converted into heroin, the figure for the possible clandestine domestic production of heroin would be well over 1% of the total heroin marketed in this country. Codeine can be made to yield about 22% heroin. See *supra*, n. 15. Applying this conversion rate to the largest annual amount of codeine stolen in the last five years (81.8 kilograms, see *supra*, n. 24) would give a figure of about 18 kilograms for the maximum amount of heroin that might have been produced from stolen codeine in any recent year. On the assumption that all stolen opium, morphine, and codeine is converted into heroin, the amount of heroin domestically produced from stolen opium and its derivatives would amount to no more than about 30 kilograms, only about 2% of the 1500 kilograms of heroin estimated to be illegally imported each year. Whether such a percentage, rather than the figure of less than 1% obtained by excluding codeine from consideration, would alter our conclusions need not be discussed, for the fact that the conversion process creates a stench makes it unrealistic to assume that stolen codeine is clandestinely converted into heroin. See *supra*, n. 15.

ufacturing heroin has not been discovered in many years.[27]

Concededly, heroin could be made in this country, at least in tiny amounts. But the overwhelming evidence is that the heroin consumed in the United States is illegally imported. To possess heroin *is* to possess imported heroin. Whether judged by the more likely than not standard applied in *Leary* v. *United States*, *supra*, or by the more exacting reasonable-doubt standard normally applicable in criminal cases, § 174 is valid insofar as it permits a jury to infer that heroin possessed in this country is a smuggled drug. If the jury relied on the § 174 instruction, it was entitled to do so.[28]

Given the fact that little if any heroin is made in the United States, Turner doubtless knew that the heroin he had came from abroad. There is no proof that he had specific knowledge of who smuggled his heroin or when or how the smuggling was done, but we are confident that he was aware of the "high probability"

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[27] Statement by the United States Delegation on the Illicit Traffic to the Twenty-third Session of the U. N. Commission on Narcotic Drugs, January 1969, at 3. One respected work on narcotics makes the claim, without further elaboration, that "recent information" leads to the conclusion that some illicit laboratories used for the conversion of opium or morphine into heroin are located in the United States. D. Maurer & V. Vogel, Narcotics and Narcotic Addiction 64 (3d ed. 1967). However, the same statement, without elaboration, appears in the 1954 edition of the work, D. Maurer & V. Vogel, Narcotics and Narcotic Addiction 50 (1954), and this fact together with the absence of any cited basis for the claim and the lack of supporting evidence elsewhere in the literature leads us to believe that the statement, if it was ever correct, is no longer accurate.

[28] It is, of course, possible for the situation to change either through the development of a simple method of synthesizing heroin or through the creation of substantial clandestine operations utilizing opium or morphine which has been illegally imported or which, though legally here, has been stolen.

that the heroin in his possession had originated in a foreign country. Cf. *Leary* v. *United States, supra,* at 45–53.[29]

It may be that the ordinary jury would not always know that heroin illegally circulating in this country is not manufactured here. But Turner and others who sell or distribute heroin are in a class apart.[30] Such people have regular contact with a drug which they know cannot be legally bought or sold; their livelihood depends on its availability; some of them have actually engaged in the smuggling process. The price, supply, and quality vary widely;[31] the market fluctuates with the ability of smugglers to outwit customs and narcotics agents at home and abroad.[32] The facts concerning heroin are

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[29] The Court in *Leary,* 395 U. S., at 46, n. 93, employed the definition of "knowledge" in Model Penal Code § 2.02 (7) (proposed official draft, 1962):

"When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person is aware of a high probability of its existence, unless he actually believes that it does not exist."

[30] Though the federal narcotics laws are in terms applicable to most possessors of illicit drugs regardless of whether the possessor is a user or a dealer, the enforcement efforts of the Bureau of Narcotics and Dangerous Drugs are directed to the development of evidence against "major sources of supply, wholesale peddlers, interstate and international violators." Hearings on the Narcotic Rehabilitation Act of 1966 before a Special Subcommittee of the Senate Committee on the Judiciary, 89th Cong., 2d Sess. 448 (1966) (hereinafter cited as 1966 Senate Hearings) (testimony of Commissioner Giordano of the Federal Bureau of Narcotics). The undisputed evidence that Turner possessed 275 glassine bags of heroin clearly shows that Turner was more than a mere user of heroin and was engaged in the distribution of the drug.

[31] See Task Force Report 3. See also 1955 Senate Hearings 3889, 4219.

[32] For example, a seizure of a large amount of pure heroin in Montreal, Canada, caused a "panic" in New York City that lasted almost three months. 1966 Senate Hearings 87.

available from many sources, frequently in the popular media. "Common sense," *Leary* v. *United States, supra,* at 46, tells us that those who traffic in heroin [33] will inevitably become aware that the produce they deal in is smuggled, unless they practice a studied ignorance to which they are not entitled.[34] We therefore have little doubt that the inference of knowledge from the fact of possessing smuggled heroin is a sound one; hence the court's instructions on the inference did not violate the right of Turner to be convicted only on a finding of guilt beyond a reasonable doubt and did not place impermissible pressure upon him to testify in his own defense.[35] His conviction on Count 1 must be affirmed.

III

Turning to the same § 174 presumption with respect to cocaine, we reach a contrary result. In *Erwing* v. *United States,* 323 F. 2d 674 (C. A. 9th Cir. 1963), a case involving a prosecution for dealing in cocaine, two experts had testified, one for the Government and one for the defense. It was apparent from the testimony that

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[33] Such a conclusion is also justified with regard to those users and addicts who frequently purchase supplies of heroin on the retail market. Such persons are of course aware of the variations in price and availability of the drug and of the fact that the success of anti-smuggling efforts of law enforcement officials affects the supply of heroin on the market. See *supra,* at 17 and nn. 31, 32.

[34] See *Griego* v. *United States,* 298 F. 2d 845, 849 (C. A. 10th Cir. 1962).

[35] "The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution." *Yee Hem* v. *United States,* 268 U. S. 178, 185 (1925).

while it is illegal to import cocaine, coca leaves, from which cocaine is prepared, are legally imported for processing into cocaine to be used for medical purposes. There was no evidence that sizable amounts of cocaine are either legally imported or smuggled. The trial court instructed on the § 174 presumption and conviction followed, but the Court of Appeals for the Ninth Circuit reversed, finding the presumption insufficiently sound to permit conviction.

Supplementing the facts presented in *Erwing, supra,* the United States now asserts that substantial amounts of cocaine are smuggled into the United States. However, much more cocaine is lawfully produced in this country than is smuggled into this country.[36] The United States concedes that thefts from legal sources, though totaling considerably less than the total smuggled,[37] are still sufficiently large to make the § 174 presumption invalid as applied to Turner's possession of cocaine.[38] Based on our own examination of the facts now before us, we reach the same conclusion. Applying the more likely than not standard employed in *Leary, supra,* we cannot be sufficiently sure either that the cocaine that Turner possessed came from abroad or that Turner must have

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[36] In 1966, 609 kilograms of cocaine were produced. U. S. Treasury Department, Bureau of Narcotics, Traffic in Opium and Other Dangerous Drugs, Report for the Year Ended December 31, 1967, at 42 (1968). Annual seizures of cocaine at ports and borders for the years 1963 through 1967 ranged from 1.44 kilograms to 17.71 kilograms; the Bureau of Narcotics and Dangerous Drugs estimates that no more than about 10% of cocaine that is attempted to be smuggled into the United States is discovered and seized at ports and borders. Brief for the United States 31, n. 31.

[37] From 1963 through 1968, the amount of cocaine stolen from legal channels annually ranged from 2.8 kilograms to 6.2 kilograms. Brief for the United States 44.

[38] Brief for the United States 28–32.

known that it did. The judgment on Count 3 must be reversed.[39]

IV

26 U. S. C. § 4704 (a)[40] makes it unlawful to purchase, sell, dispense or distribute a narcotic drug not in or from the original package bearing tax stamps. In this case, Count 2 charged that Turner knowingly purchased, dispensed and distributed heroin hydrochloride not in or from the original stamped package.[41] Count 4 made the identical charge with respect to cocaine. Section 4704 (a) also provides that the absence of appropriate tax stamps shall be prima facie evidence of a violation by the person in whose possession the drugs are found. This provision was read by the trial judge to the jury.

The conviction on Count 2 with respect to heroin must be affirmed. Since the only evidence of a violation involving heroin was Turner's possession of the drug, the jury to convict must have believed this evidence. But part and parcel of the possession evidence and indivisibly linked with it, was the fact that Turner

[39] Since the illegal possessor's only source of domestic cocaine is that which is stolen, the United States urges that the § 174 presumption may be valid with respect to sellers found with much larger amounts of cocaine than Turner had, amounts which, it is claimed, are too large to have been removed from legal channels and which must therefore have been smuggled. Brief for the United States 31. We find it unnecessary to deal with these problems and postpone their consideration to another day, hopefully until the facts are presented in an adversary context in the district courts.

[40] See *supra*, n. 2.

[41] The indictment charged that Turner *possessed* heroin as well as purchasing, dispensing, and distributing the drug. The instructions to the jury made the same error. No objections was made in the trial court and the issue was not raised in the Court of Appeals or in this Court. The error was harmless in any event since the possession evidence proved that Turner was distributing heroin. See *infra*, at 21.

possessed some 275 glassine bags of heroin without revenue stamps attached. This evidence, without more, solidly established that Turner's heroin was packaged to supply individual demands and was in the process of being distributed, an act barred by the statute. The general rule is that when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, as Turner's indictment did, the verdict stands if the evidence is sufficient with respect to any one of the acts charged.[42] Here the evidence proved Turner was distributing heroin. The status of the case with respect to the other allegations is irrelevant to the validity of Turner's conviction. So, too, the instruction on the presumption is beside the point, since even if invalid, it was harmless error; the jury must have believed the possession evidence which in itself established a distribution barred by the statute.

Moreover, even if the evidence as to possession is viewed as not in itself proving that Turner was distributing heroin, his conviction must be affirmed. True, the statutory inference, which on this assumption would assume critical importance, could not be sustained insofar as it authorized an inference of dispensing or distributing (or of selling if that act had been charged), for the bare fact of possessing heroin is far short of sufficient evidence from which to infer any of these acts. Cf. *Tot* v. *United States, supra; United States* v. *Romano, supra.* But the inference of *purchasing* in or from an unstamped package is another matter.

Those possessing heroin have secured it from some source. The act of possessing is itself sufficient proof

[42] *Crain* v. *United States,* 162 U. S. 625, 634–636 (1896); *Smith* v. *United States,* 234 F. 2d 385, 389–390 (C. A. 5th Cir. 1956); *Price* v. *United States,* 150 F. 2d 283 (C. C. A. 5th Cir. 1945), cert. denied, 326 U. S. 789 (1946). See also *Claassen* v. *United States,* 142 U. S. 140 (1891); *The Confiscation Cases,* 20 Wall. 92, 104 (1874).

that the possessor had not received it in or from the original stamped package, since it is so extremely unlikely that a package containing heroin would ever be legally stamped. All heroin found in this country, is illegally imported. Those handling narcotics must register;[43] registered persons do not deal in heroin and only registered importers and manufacturers are permitted to purchase stamps.[44] For heroin to be found in a stamped package, stamps would have to be stolen and fixed to the heroin container and even then the stamps would immunize the transactions in the drug only from prosecution under § 4704 (a); all other laws against transactions in heroin would be unaffected by the presence of the stamps. There can thus be no reasonable doubt that one who possesses heroin did not obtain it from a stamped package.

Even so, obtaining heroin other than in the original stamped package is not a crime under § 4704 (a). Of the various ways of acquiring heroin, *e. g.*, by gift, theft, bailment or purchase, only purchasing is proscribed by the section. Since heroin is a high-priced product,[45] it would be very unreasonable to assume that any sizable number of possessors have not paid for it, one way or another. Perhaps a few acquire it by gift and some heroin undoubtedly is stolen, but most users may be presumed to purchase what they use. The same may be said for those who sell, dispense or distribute the drug. There is no reasonable doubt that a possessor of heroin who has purchased it, did not purchase the heroin in or from the original stamped package. We thus would sustain the conviction on Count 2 on the basis of a purchase not in or from a stamped package even if the

[43] 26 U. S. C. §§ 4721, 4722. See also 26 U. S. C. § 4702 (a) (2) (C).

[44] 26 CFR §§ 151.130, 151.41.

[45] Heroin is reported to sell for around $5 per "bag" or packet. Task Force Report 3.

evidence of packaging did not point unequivocally to the conclusion that Turner was distributing heroin not in a stamped package.

V

Finally, we consider the validity of the § 4704 (a) presumption with respect to cocaine. The evidence was that while in the custody of the police, Turner threw away a tinfoil package containing a mixture of cocaine and sugar, which, according to the Government, is not the form in which cocaine is distributed for medicinal purposes.[46] Unquestionably, possession was amply proved by the evidence, which the jury must have believed since it returned a verdict of guilty. But the evidence with respect to Turner's possession of cocaine does not so surely demonstrate that Turner was in the process of distributing this drug. Would the jury automatically and unequivocally know that Turner was distributing cocaine simply from the fact that he had 14.68 grams of a cocaine and sugar mixture? True, his possession of heroin proved that he was dealing in drugs, but having a small quantity of a cocaine and sugar mixture is itself consistent with Turner's possessing the cocaine not for sale but exclusively for his personal use.

Since Turner's possession of cocaine did not comprise an act of purchasing, dispensing or distributing, the instruction on the statutory inference becomes critical. As in the case of heroin, bare possession of cocaine is an insufficient predicate for concluding that Turner was dispensing or distributing. As for the remaining possible violation, purchasing other than in or from the original stamped package, the presumption, valid as to heroin, is infirm as to cocaine.

While one can be confident that cocaine illegally manufactured from smuggled coca leaves or illegally

[46] Brief for the United States 33.

imported after manufacturing would not appear in a stamped package at any time, cocaine, unlike heroin, is legally manufactured in this country;[47] and we have held that sufficient amounts of cocaine are stolen from legal channels to render invalid the inference authorized in § 174 that any cocaine possessed in the United States is smuggled cocaine. *Ante*, at 18–20. Similar reasoning undermines the § 4704 (a) presumption that a defendant's possession of unstamped cocaine is prima facie evidence that the drug was purchased not in or from the original stamped container. The thief who steals cocaine very probably obtains it in or from a stamped package. There is a reasonable possibility that Turner either stole the cocaine himself or obtained it from a stamped package in possession of the actual thief. The possibility is sufficiently real that a conviction resting on the § 4704 (a) presumption cannot be deemed a conviction based on sufficient evidence. To the extent that *Casey* v. *United States*, *supra*, is read as giving general approval to the § 4704 (a) presumption, it is necessarily limited by our decision today. Turner's conviction on Count 4 must be reversed.

For the reasons stated above, we affirm the judgment of conviction as to Counts 1 and 2 and reverse the judgment of conviction as to Counts 3 and 4.

It is so ordered.

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[47] See *supra*, n. 36.

SUPREME COURT OF THE UNITED STATES

No. 190.—October Term, 1969

James Turner, Petitioner, v. United States. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[January 20, 1970]

Mr. Justice Marshall, concurring.

I concur in the judgment of the Court, affirming petitioner's conviction on Counts 1 and 2 and reversing his conviction on Counts 3 and 4. In so doing, however, I can agree with the majority on Count 2 only insofar as it concludes that evidence of possession of 275 glassine bags of heroin proved beyond a reasonable doubt that Turner was distributing heroin in violation of 26 U. S. C. § 4704 (a). That same evidence does not establish that he had *purchased* the heroin in violation of that statute.

The opinion of the Court establishes convincingly the virtual certainty that the heroin in Turner's possession had been illegally imported into the country. It was thus proper with regard to Count 1 for the trial judge to instruct the jurors in effect that if they found that Turner did indeed possess the drug, they could infer that the heroin had been illegally imported and impute knowledge of that fact to Turner. However, the instruction that possession is prima facie evidence of a violation of § 4704 (a) is quite different. It may be true that most persons who possess heroin have purchased it not in or from a stamped package However, Turner himself may well have obtained the heroin involved here in any of a number of ways—for example, by stealing it from another distributor, or by manufacturing or otherwise acquiring it abroad and smuggling it into this coun-

try. Given the dangers that are inherent in any statutory presumption or inference, some of which are set out in the dissenting opinion of MR. JUSTICE BLACK, I cannot agree with the wholly speculative and conjectural holding that because Turner possessed heroin he must have purchased it in violation of § 4704 (a).

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[January 20, 1970]

Mr. Justice Black, with whom Mr. Justice Douglas joins, dissenting.

Few if any decisions of this Court have done more than this one today to undercut and destroy the due process safeguards the federal Bill of Rights specifically provides to protect defendants charged with crime in United States courts. Among the accused's Bill of Rights' guarantees which the Court today weakens are:

1. His right not to be compelled to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury;

2. The right to be informed of the nature and cause of the accusation against him;

3. The right not to be compelled to be a witness against himself;

4. The right not to be deprived of life, liberty, or property without due proess of law;

5. The right to be confronted with the witnesses against him;

6. The right to compulsory process for obtaining witnesses for his defense;

7. The right to counsel;

8. The right to trial by an impartial jury.

The foregoing rights are among those which the Bill of Rights specifically spells out and which due process

requires that a defendant charged with crime must be accorded. The Framers of our Constitution and Bill of Rights were too wise, too pragmatic, and too familiar with tyranny to attempt to safeguard personal liberty with broad, flexible words and phrases like "fair trial," "fundamental decency," and "reasonableness." Such stretchy, rubberlike terms would have left judges constitutionally free to try people charged with crime under will-o'-the-wisp standards improvised by different judges for different defendants. Neither the Due Process Clause nor any other constitutional language vests any judge with such power. Our Constitution was not written in the sands to be washed away by each wave of new judges blown in by each successive political wind which brings new political administrations into temporary power. Rather, our Constitution was fashioned to perpetuate liberty and justice by marking clear, explicit, and lasting constitutional boundaries for trials. One need look no further than the language of that sacred document itself to be assured that defendants charged with crime are to be accorded due process of law—that is, they are to be tried as the Constitution and the laws passed pursuant to it prescribe and not under arbitrary procedures that a particular majority of sitting judges may see fit to label as "fair" or "decent." I wholly, completely, and permanently reject the so-called "activist" philosophy of some judges which leads them to construe our Constitution as meaning what they now think it should mean in the interest of "fairness and decency" as they see it. This case and the Court's holding in it illustrate the dangers inherent in such an "activist" philosophy.

Commercial traffic in deadly mind, soul, and body-destroying drugs is beyond doubt one of the greatest evils of our time. It cripples intellects, dwarfs bodies, paralyzes the progress of a substantial segment of

our society, and frequently makes hopeless and sometimes violent and murderous criminals of persons of all ages who become its victims. Such consequences call for the most vigorous laws to suppress the traffic as well as the most powerful efforts to put these vigorous laws into effect. Unfortunately, grave evils such as the narcotics traffic can too easily cause threats to our basic liberties by making attractive the adoption of constitutionally forbidden shortcuts that might suppress and blot out more quickly the unpopular and dangerous conduct. That is exactly the course I think the Court is sanctioning today. I shall now set out in more detail why I believe this to be true.

Count 1 of the indictment against Turner, as the Court's opinion asserts, and as I agree,

> "charged Turner with (1) knowingly receiving, concealing and transporting heroin which (2) was illegally imported and which (3) he knew was illegally imported. For conviction it was necessary for the Government to prove each of these three elements of the crime to the satisfaction of the jury beyond a reasonable doubt." *Ante,* at 6.

The Court in the above statement is merely reaffirming the fundamental constitutional principle that the accused is presumed innocent until he is proven guilty and that the Government, before it can secure a conviction, must demonstrate to the jury beyond a reasonable doubt each essential element of the alleged offense. This basic principle is clearly reflected in several provisions of the Bill of Rights. The Fifth and Sixth Amendments provide that as a part of due process of law a person held for criminal prosecution shall be charged on a presentment or indictment of a grand jury and that the defendant shall "be informed of the nature and cause of the accusation." The purpose of these requirements

is obviously to compel the Government to state and define specifically what it must prove in order to convict the defendant so that he can intelligently prepare to defend himself on each of the essential elements of the charge. And to aid the accused in making his defense to the charges thus defined, the Bill of Rights provides the accused explicit guarantees—the privilege against self-incrimination, the right to counsel, the right to confront witnesses against him and to call witnesses in his own behalf—all designed to assure that the jury will as nearly as humanly possible be able to consider fully all the evidence and determine the truth of every case.

Having invoked the above principles, however, the Court then proceeds to uphold Turner's conviction under Count 1 despite the fact that the prosecution introduced absolutely no evidence at trial on two of the three essential elements of the crime. To show this I think one need look no further than the Court's own majority opinion. The Court says:

> "The proof was that Turner had knowingly possessed heroin; since it is illegal to import heroin or to manufacture it here, he was also chargeable with knowing that his heroin had an illegal source. For all practicable purposes, that was the Government's case." *Ante,* at 6.
>
> "Whatever course the jury took, it found Turner guilty beyond a reasonable doubt and the question on review is the sufficiency of the evidence, or more precisely, the soundness of inferring guilt from the *proof of possession alone.*" *Ante,* at 8. (Emphasis added.)

These passages show that the Government wholly failed to meet its burden of proof at trial on two of the elements Congress deemed essential to the crime it defined. The prosecution introduced *no* evidence to prove either

(1) that the heroin involved was illegally imported or (2) that Turner knew the heroin was illegally imported. The evidence showed only that Turner was found in possession of heroin.

I do not think a reviewing court should permit to stand a conviction as wholly lacking in evidentiary support as is Turner's conviction under Count 1. *Bozza* v. *United States*, 330 U. S. 160 (1947). See also *Thompson* v. *Louisville*, 362 U. S. 199 (1960). When the evidence of a crime is insufficient as a matter of law, as the evidence here plainly is, a reversal of the conviction is in accord with the historic principle that "independent trial judges and independent appellate judges have a most important place under our constitutional plan since they have the power to set aside convictions." *United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 19 (1955). I would therefore reverse Turner's conviction under Count 1 without further ado. Moreover, as the majority opinion and the record in this case indicate, petitioner's convicitons under Counts 3 and 4 are also based upon totally insufficient evidence, for as in Count 1 the prosecution failed to introduce any evidence to support certain essential elements of the crimes charged under these Counts. They, too, should be reversed for lack of evidence.

The Court attempts to take the stark nakedness of the evidence against Turner on these counts and clothe it in "presumptions" or "inferences" authorized by 21 U. S. C. § 174 and 26 U. S. C. § 4704 (a). Apparently the Court feels that the Government can be relieved of the constitutional burden of proving the essential elements of its case by a mere congressional declaration that certain evidence shall be deemed sufficient to convict. Such an idea seems to me to be totally at variance with what the Constitution requires. Congress can undoubtedly create crimes and define their elements, but it cannot under our Constitution even partially remove

from the prosecution the burden of proving at trial each of the elements it has defined. The fundamental right of the defendant to be presumed innocent is swept away to precisely the extent judges and juries rely upon the statutory presumptions of guilt found in 21 U. S. C. § 174 and 26 U. S. C. § 4704 (a). And each of the weapons given by the Bill of Rights to the criminal accused to defend his innocence—the right to counsel, the right to confront the witnesses against him and to subpoena witnesses in his favor, the privilege against self-incrimination—is nullified to the extent that the Government to secure a conviction does not have to introduce any evidence to support essential allegations of the indictment it has brought. It would be a senseless and stupid thing for the Constitution to take all these precautions to protect the accused from governmental abuses if the Government could by some slight-of-hand trick with presumptions make nullities of those precautions. Such a result would completely frustrate the purpose of the Founders to establish a system of criminal justice in which the accused—even the poorest and most humble—would be able to protect himself from wrongful charges by a big and powerful government. It is little less than fantastic even to imagine that those who wrote our Constitution and the Bill of Rights intended to have a government that could create crimes of several separate and independent parts and then relieve the government of proving a portion of them. Of course, within certain broad limits it is not necessary for Congress to define a crime to include any particular set of elements. *But if it does,* constitutional due process requires the Government to prove each element beyond a reasonable doubt before it can convict the accused of the crime it deliberately and clearly defined. Turner's trial therefore reminds me more of Daniel being cast into the lion's den than it does of a constitutional proceeding. The Bible

tells us Daniel was saved by a miracle, but when this Court says its final word in this case today, we cannot expect a miracle to save petitioner Turner.

I would have more hesitation in setting aside these jury verdicts for insufficiency of the evidence were I confident that the jury had been allowed to make a free and unhampered determination of guilt or innocence as the jury trial provisions of Article III of the Constitution and the Sixth Amendment require. The right to trial by jury includes the right to have the jury and the jury alone find the facts of the case, including the crucial fact of guilt or innocence. See, *e. g., United States ex rel. Toth* v. *Quarles*, 350 U. S. 11, 15–19 (1955). This right to have the jury determine guilt or innocence necessarily includes the right to have that body decide whether the evidence presented at trial is sufficient to convict. Turner's convictions on each count were secured only after the jury had been explicitly instructed by the trial judge that proof of Turner's mere possession of heroin and cocaine "shall be deemed sufficient evidence to authorize conviction" under 21 U. S. C. § 174, and "shall be prima facie evidence of a violation" of 26 U. S. C. § 4704 (a). App., at 15–18. In my view, these instructions to the jury impermissibly interfered with the defendant's Sixth Amendment right to have the jury determine when evidence is sufficient to justify a finding of guilt beyond a reasonable doubt.

The instructions directing the jury to presume guilt in this case were not, of course, the trial judge's own inspiration. Congress, in enacting the statutory presumptions purporting to define and limit the quantum of evidence necessary to convict, has injected its own views and controls into the guilt-determining, factfinding process vested by our Constitution exclusively in the Judicial Branch of our Government. The Fifth Amendment's command that cases be tried according to due

process of law includes the accused's right to have his case tried by a judge and a jury in a court of law without legislative constraint or interference. These statutory presumptions clearly violate the command of that Amendment. Congress can declare a crime, but it must leave the trial of that crime to the courts. See *Leary* v. *United States*, 395 U. S. 6, 55 (1969) (concurring opinion); and *United States* v. *Gainey*, 380 U. S. 63, 84–85 (1965) (dissenting opinion).

It is my belief that these statutory presumptions are totally unconstitutional for yet another reason, and it is a critically important one. As discussed earlier, the Constitution requires that the defendant in a criminal case be presumed innocent and it places the burden of proving guilt squarely on the Government. Statutory presumptions such as those involved in this case rob the defendant of at least part of his presumed innocence and cast upon him the burden of proving that he is not guilty. The presumption in 21 U. S. C. § 174 makes this shift in the burden of proof explicit. It provides that possession of narcotic drugs shall be deemed sufficient evidence to justify a conviction "unless the defendant explains the possession to the satisfaction of the jury." However, so far as robbing the defendant of his presumption of innocence is concerned, it makes no difference whether the statute explicitly says the defendant can rebut the presumption of guilt (as does the provision of 21 U. S. C. § 174 just quoted), or whether the statute simply uses the language of "prima facie case" and leaves implicit the possibility of the defendant's rebutting the presumption (as does 26 U. S. C. § 4704 (a)). Presumptions of both forms tend to coerce and compel the defendant into taking the witness stand in his own behalf, in clear violation of the accused's Fifth Amendment privilege against self-incrimination. This privilege has been consistently interpreted to establish

the defendant's absolute right not to testify at his own trial unless he freely chooses to do so. As we observed in *Malloy* v. *Hogan*, 378 U. S. 1, 8 (1964), "the privilege is fulfilled only when the person is guaranteed the right to remain silent unless he chooses to speak in the unfettered exercise of his own will . . . ." The defendant's right to free and unfettered choice in whether or not to testify is effectively destroyed by the coercive effect of the statutory presumptions found in 21 U. S. C. § 174 and 26 U. S. C. § 4704 (a). See *United States* v. *Gainey*, 380 U. S. 63, 71–74, 87 (1965) (dissenting opinions). Moreover, when the defendant declines to testify and the trial judge states to the jury as he did in this case that evidence of possession of narcotics shall be deemed sufficient to convict "unless the defendant explains the possession to the satisfaction of the jury," such an instruction is nothing less than judicial comment upon the defendant's failure to testify, a practice which we held violative of the Self-Incrimination Clause in *Griffin* v. *California*, 380 U. S. 609 (1965).

How does the Court respond to the grave constitutional problems raised by these presumptions of guilt? It says only that these presumptions are, in its view, "reasonable" or factually supportable "beyond a reasonable doubt." In other words, the Court has concluded that the presumptions are "fair" and apparently thinks that is a sufficient answer. It matters not to today's majority that the evidence which it cites to show the factual basis of the presumptions was never introduced at petitioner's trial, and that petitioner was never given an opportunity to confront before the jury the many expert witnesses now arrayed against him in the footnotes of the Court's opinion. Nor does it apparently matter to the Court that the factfinding role it undertakes today is constitutionally vested not in this Court but in the jury. If Congress wants to make simple possession of

narcotics an offense, I believe it has power to do so. But this Court has no such constitutional power. Nor has Congress the power to relieve the prosecution of the burden of proving all the facts which it as a legislative body deems crucial to the offenses it creates.

For the reasons stated here, I would without hesitation reverse petitioner's conviction under Counts 1, 2, 3, and 4.